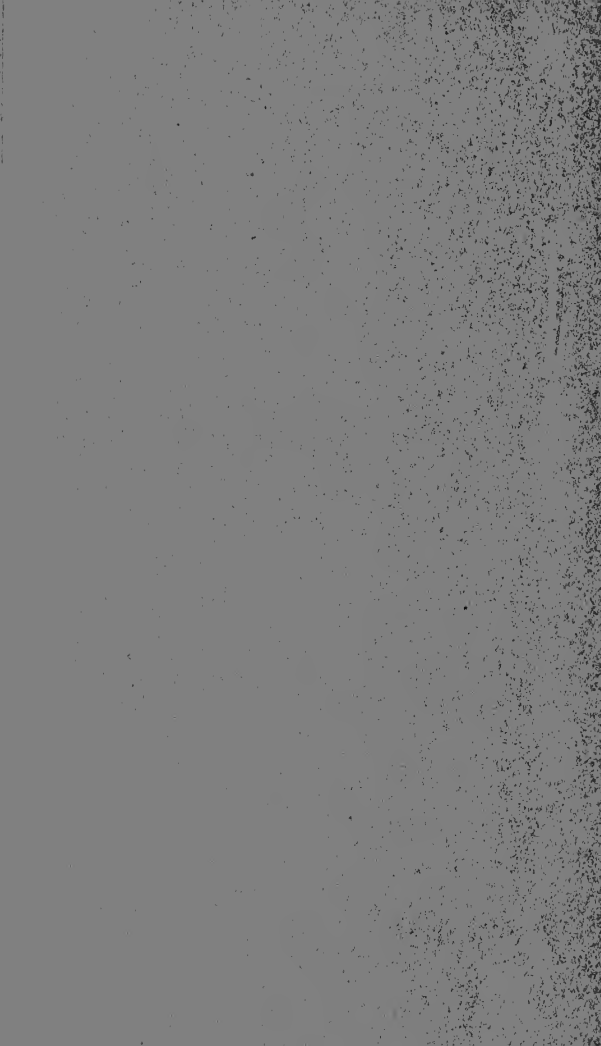
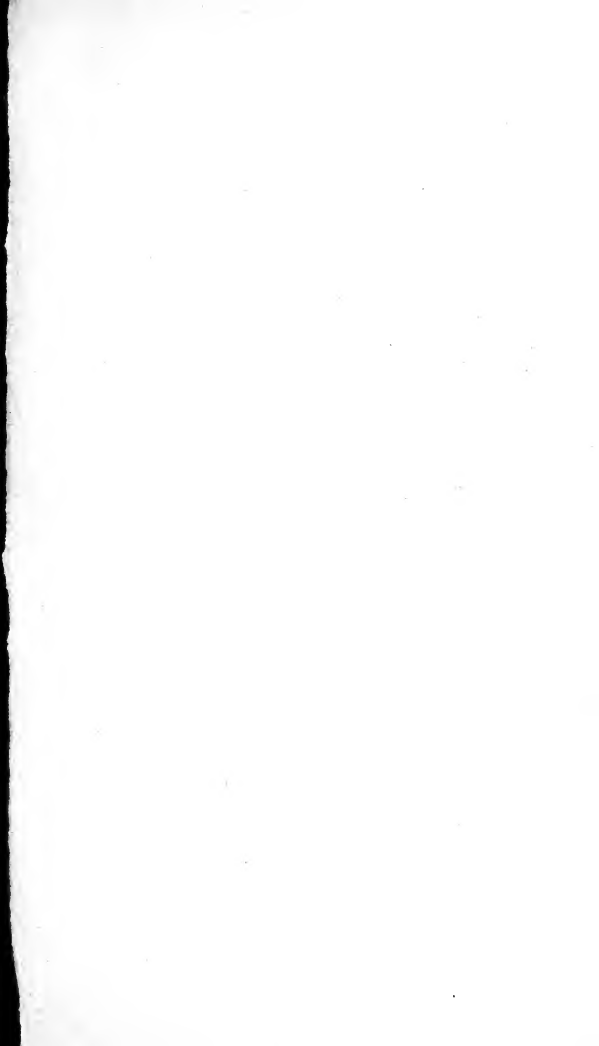


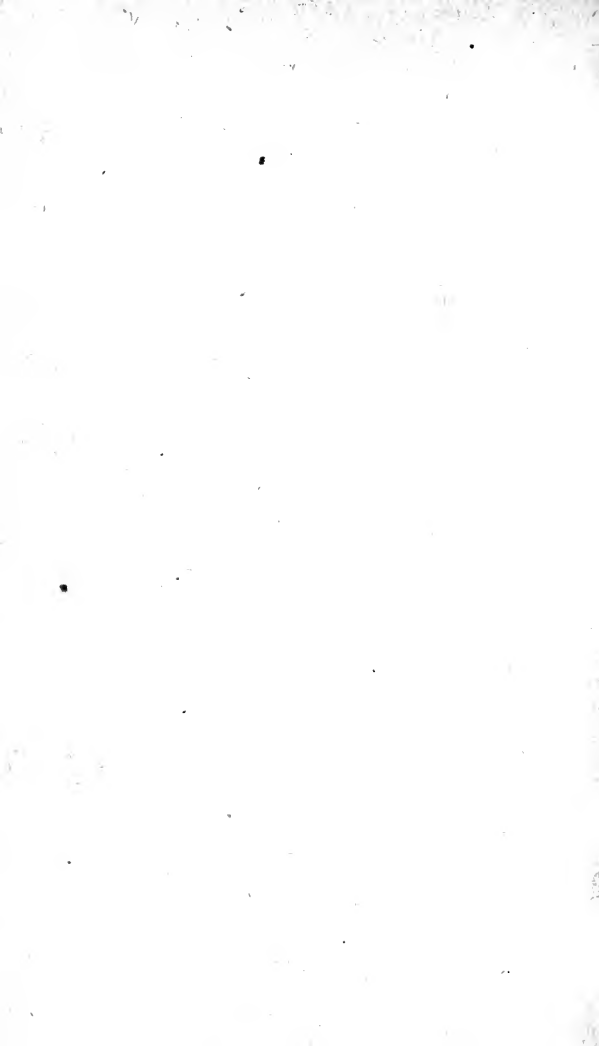
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**THE LAW OF  
SALES OF PERSONAL PROPERTY.**

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THE LAW

OF

SALES OF PERSONAL PROPERTY

AS NOW ESTABLISHED IN

THE UNITED STATES AND GREAT BRITAIN.

BY

NATHAN NEWMARK,

OF THE SAN FRANCISCO BAR.



SAN FRANCISCO:  
BANCROFT-WHITNEY CO.

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PREFACE. *MAIN*

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THIS work is offered to the profession as the result of an attempt to make a concise, complete, and convenient presentation of the intricate and expanding law relating to Sales of Personal Property. The aim of the writer is to exhibit, within a small compass, in a suggestive manner, which may be serviceable to the active practitioner, as well as to the student and investigator, the sum and substance of the present law of the subject stated, as it is determined by English and American courts and developed in legal dictionaries, phrase-books, or commentaries, in treatises, monographs, or essays dealing wholly or partly with this subject or with cognate topics, in leading and recent cases, and in other decisions incorporated as being of special interest or illustrative force.

The arrangement adopted will be seen to deal, first, with the formation, effect, and performance of the contract, and with its features as established at common law and under the statute of frauds; then with direct and collateral stipulations connected with the contract, and with the grounds which render the contract liable to defeat and avoidance; and finally, with the remedies of the parties for a breach of the contract. Special consideration has been given to the particular topics, sometimes made the subject of extended investigation, of transactions resembling sales, executory sales in all their

phases, transfer of title, *bona fide* purchasers, mistake, failure of consideration, warranty, and the seller's special remedies against the goods. It is hoped that the mode of arrangement, the use of various devices of type, and the fullness of the index will render the matter readily accessible, and the work in every way suitable for immediate consultation at court or in the office.

NATHAN NEWMARK.

SAN FRANCISCO, October, 1887.

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# THE LAW OF SALES.

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### NATURE.

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- § 2. Scope of term.
- § 3. Elements of contract.
- § 4. Consideration.
- § 5. Transfer of title.
- § 6. Classification of sales.

§ 1. *Definitions.*—*Of general character.* Sale is said to be a word of precise legal import, which means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay for the thing bought and sold.<sup>1</sup> It is also described as an agreement by which one of the contracting parties, called the seller, gives a thing and passes title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, and who, on his part, agrees to pay such price.<sup>2</sup>

*By text-writers and commentators.* The leading text-writers define sale as a transfer of the absolute or general property in a thing for a price in money,<sup>3</sup> and as a transfer of the absolute title to property for a certain agreed price.<sup>4</sup> And the legal commentators define sale as a transmutation of property from one man to another in consideration of some price,<sup>5</sup> or as a contract for the transfer of property from one person to another for a valuable consideration.<sup>6</sup>

*Defects of ordinary definitions.* But the ordinary definition of a sale, as a transmutation of property from one person to another for a price, does not fully express all the essential elements of the contract.<sup>7</sup> A more complete enumeration of these would be, competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale and the price to be paid therefor.<sup>8</sup>

*Words constituting sale of a chattel.* Independently of the statute of frauds, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell it, and whereby any other person signifies his willingness and consent to buy it, *in præsentia*, for a specified price, would be a sale and transfer of the right to the chattel.<sup>9</sup>

1 *Williamson v. Berry*, 8 How. 495, 544. And see *Hutmacher v. Harris*, 38 Pa. St. 491, 498; *Bigley v. Risher*, 63 Pa. St. 152, 155; *Mackanness v. Long*, 85 Pa. St. 153; *Edwards v. Cottrell*, 43 Iowa, 194, 204. Various interpretations of word collected; 2 *Abbott's Law Dict.* 442, 443. A disposition of public lands in satisfaction of military land warrants is not a sale entitling a State to percentage under its act of admission: *Five Per Cent Cases*, 110 U. S. 471, 479.

2 *Eldridge v. Kuehl*, 27 Iowa, 160, 173; 2 *Bouvier Law Dict.* tit. Sale (15th ed.) 606; *Winfield's Words*, etc. 547. And see *Madison Avenue etc. Church v. Baptist Church*, 46 N. Y. 131, 139. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself: *La. Civ. Code*, art. 2439; *Stims. Am. Stat. Law*, § 4560.

3 *Benjamin on Sales*, § 1; *Wittowsky v. Wasson*, 71 N. C. 451. See *Landreth Sale*, 12. And compare *Campb. Sales*, 1.

4 *Story on Sales*, § 1; *Creveling v. Wood*, 95 Pa. St. 152, 158. See 2 *Schouler on Personal Property*, § 200. But compare 2 *Abbott's Law Dict.* tit. Sale, p. 441.

5 2 *Blackst. Com.* 446. Or recompense in value: *Parker v. Donaldson*, 2 *Watts & S.* 19. Accompanied in the case of goods and chattels, whenever it is practicable, with a delivery of the article to the purchaser: *Patten v. Smith*, 5 *Conn.* 196. Compare *Hilliard on Sales*, § 1; *Long on Sales*, 1.

6 2 *Kent Com.* 468. See *Madison Ave. etc. Church v. Baptist Church*, 46 N. Y. 131, 139; *Five Per Cent Cases*, 110 U. S. 471, 478, 488.

7 *Gardner v. Lane*, 12 *Allen*, 39, 43. See 2 *Abbott's Law Dict.* 442.

8 *Gardner v. Lane*, 12 *Allen*, 39, 43. If any of these ingredients be wanting, there is no sale: *Atkinson on Sales*, 5. See *Winfield's Words*, etc. 547; 2 *Abbott's Law Dict.* 442.

9 *De Foncleare v. Shottenkirk*, 3 *Johns.* 170, 174; *Fancher v. Goodman*, 29 *Barb.* 315, 318.

§ 2. *Scope of term.*—*Technical limitation to personality.* The term “sales” is at the present time, as a general rule, technically limited in its application to personal property, while the corresponding transfers of real property are usually treated under the title of “vendors and purchasers.”<sup>1</sup>

*As contract for transfer.* But it has been suggested upon a critical survey of the various definitions of sale, that the view which seems to reconcile all the uses of the word “sale,” as in the expressions “conditional sales,” “executory sales,” etc., most satisfactorily, is to regard sale as a contract or agreement for transferring ownership,<sup>2</sup> and not as the very transfer itself.<sup>3</sup> It may then be properly applied to lands and rights in action as it daily is, as well as to chattels.<sup>4</sup>

*As transfer of interest.* In a comprehensive sense, a sale is a parting with one's interest in a thing for a valuable consideration.<sup>5</sup> But such a transfer is more generally termed an assignment.<sup>6</sup>

*Usual meaning.* A very complete definition of sales in their usual aspects is found in the statement that by the term “sale” is meant the transfer of the property in a thing, whether real or personal, for a price in money, and not in goods or other property.<sup>7</sup>

1 Schouler on Personal Property, § 199. And see Pomeroy's Article, 4 Johns. Cycl. 1646.

2 See Granam's Blackb. Sales, Introd. ix. Consult Landreth Sale, 11. And compare Cambb. Sales, 2.

3 Abbott's Law Dict. tit. Sale, p. 442. The term “sales” in its largest sense, may include every agreement for the transferring of ownership, whether immediate or to be completed afterwards: *Cunningham v. Ashbrook*, 20 Mo. 553, 556.

4 2 Abbott's Law Dict. tit. Sale, p. 442. And there may thus be a justifiable division of sales into those which are executed, either by operation of law upon the contract, or by after acts, and those which are executory, or yet to be carried into effect by conveyance, assignment, or delivery: 2 Abbott's Law Dict. tit. Sale, p. 442. By the Roman law, a sale was not an immediate transmutation of property, but a contract of mutual and personal engagements for the transference of the thing on the one hand, and the payment of the price on the other, without regard to the time of performance on either

part, that being left to be regulated by the agreement of the parties: Bell on Sale, 9; Cunningham v. Ashbrook, 20 Mo. 553, 557. The seller was bound to deliver the thing in property to the buyer at the time agreed on, and the buyer to pay the price in the manner settled between them: Cunningham v. Ashbrook, 20 Mo. 553, 557. And see Story on Sales, § 2, et seq. But compare Benjamin on Sales, § 405, et seq.; 2 Schouler on Personal Property, § 237.

5 Western Mass. Ins. Co. v. Riker, 10 Mich. 231; Winfield's Words etc. 547. It is a contract by which for a pecuniary consideration called a price, one transfers to another an interest in property: Cal. Civ. Code, § 1721; Dak. Civ. Code, § 981; Stims. Am. Stat. Law, § 4560.

6 See § 7, on SALE OR ASSIGNMENT.

7 Pomeroy's Article, 4 Johns. Cycl. 1646.

§ 3. **Elements of contract.**—*Enumeration of.* Three particulars are included in a valid sale, namely, a thing which is the subject of it, a price, and the consent of parties.<sup>1</sup>

*At common law.* And at common law these were the only things essential to a valid sale of personal property, and their concurrence rendered the sale complete, so that the title passed without anything more.<sup>2</sup>

*Under civil law.* So under the civil law, as followed in this country, three circumstances concur to the perfection of the contract, to wit, the thing sold, the price, and the consent.<sup>3</sup>

1 Schermerhorn v. Talman, 14 N. Y. 93, 117; Long on Sales, 3; Winfield's Words, etc. 543. If the subject of the sale have no existence, actually or potentially, there can be no valid sale: Winfield's Words, etc. 548. Like effect: 2 Kent Com. 468. And compare Gardner v. Lane, 12 Allen, 39, 43, ascited in § 1; Pomeroy's Article, 4 Johns. Cycl. 1646.

2 Cunningham v. Ashbrook, 53 Mo. 553, 556. And see 2 Blackst. Com. 448; Bloxam v. Sanders, 4 Barn. & C. 941, 948. Delivery of the goods was not a necessary element in a sale, although it often becomes important for other reasons, not concerning the transfer of title: See Pomeroy's Article, 4 Johns. Cycl. 1647.

3 Kleupeter v. Harrison, 21 La. An. 196, 197; La. Civ. Code, art. 2439. And see Ga. Civ. Code, § 2629.

§ 4. **Consideration.**—*Valuable consideration.* A sale is sometimes said to embrace every transfer for a valuable consideration,<sup>1</sup> whether paid in cash or other property.<sup>2</sup> And in a general and popular sense, the sale of an article signifies the transfer of property from one

person to another for a consideration of value, without reference to the particular mode in which the consideration is paid.<sup>3</sup>

*Money price.* But its technical and narrow sense is that of a transfer paid or agreed to be paid in money.<sup>4</sup> And ordinarily this is the distinction taken between a sale and a barter or exchange of goods for goods.<sup>5</sup>

*Estimation in money standard.* Yet it is perhaps more accurately declared that a sale is a transfer of property for a fixed price in money, or its equivalent,<sup>6</sup> and the feature of estimation in a money standard is sometimes made the criterion to determine whether a transaction is a sale or an exchange.<sup>7</sup>

*In various aspects.* The existence of a valuable consideration is also generally deemed to distinguish a sale from a gift, or voluntary transfer, without consideration.<sup>8</sup> A sale *ex vi termini* means a conveyance for a fair consideration.<sup>9</sup> And a power of attorney, under seal, irrevocable, and expressly stated to be for "value received," to transfer a registered bond, is *prima facie* a sale of the bond, for a present consideration, to the person in whose favor it was made, and relieves the transferrer from proving that he paid value therefor at the time of the transfer.<sup>10</sup> A delivery of articles, in consideration of being paid what they are worth, constitutes a sale.<sup>11</sup>

1 See 2 Kent Com. 468.

2 Madison Ave. etc. Church v. Baptist Church, 46 N. Y. 131, 140; S. C. 11 Abb. Pr. N. S. 132, 140.

3 Howard v. Harris, 8 Allen, 297, 299. And it is laid down that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes, and there is a sale and not a bailment: South Aust. Ins. Co. v. Randell, Law R. 3 P. C. 101.

4 Howard v. Harris, 8 Allen, 297, 299. And see Commonw. v. Davis, 12 Bush, 240, 241.

5 See Commonw. v. Clark, 14 Gray, 367, 372; Mitchell v. Gile, 12 N. H. 390, 395; 2 Blackst. Com. 446.

6 Five Per Cent Cases, 110 U. S. 471, 478.

7 See *Gunter v. Lecky*, 30 Ala. 591, 596 ; *Picard v. McCormick*, 11 Mich. 68, 77.

8 See *Gray v. Burton*, 55 N. Y. 68, 72.

9 *Laird v. Scott*, 5 Heisk. 348 ; *Winfield's Words*, etc. 547.

10 *Pennsylvania Company's Appeal*, 86 Pa. St. 102, 106.

11 *Hill v. Hill*, *Coxe*, 261 ; 1 Am. Dec. 206.

§ 5. *Transfer of title.*—*As feature of sale.* A sale viewed in regard to its effect is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration.<sup>1</sup> In the legal import of the word, it implies the transferring of property<sup>2</sup> from the seller to the buyer for a price,<sup>3</sup> and includes not only the idea of divesting the seller of the title, but also of vesting it in the buyer.<sup>4</sup>

*Immediate or postponed.* There must be an immediate transfer of the title to constitute a present sale or "bargain and sale" at common law, as distinguished from a mere agreement for a future sale or "executory agreement."<sup>5</sup> Thus, it is competent for the parties expressly to agree that the title to the property shall not pass, except on the performance of a precedent or concurrent condition, in which case there will not be a complete sale, but an executory contract.<sup>6</sup> So when anything remains to be done in the way of specifically appropriating the goods sold to the contract, the agreement is executory, and the property does not pass.<sup>7</sup>

*Absolute or general.* The fact that there must be a transfer of the absolute title or general property, to constitute a sale of personal property, distinguishes that contract from a bailment, in which there is, at most, a transfer of the special property.<sup>8</sup>

1 *Creveling v. Wood*, 95 Pa. St. 152, 158 ; *Story on Sales*, § 1 ; *Winfield's Words*, etc. 547.

2 See *Edwards v. Farmers' Ins. Co.* 21 Wend. 494. Effect of sale under Roman, civil, and French law : *Benjamin on Sales*, §§ 401, 412 ; 2 *Schouler on Personal Property*, § 237. Under Scotch law : *McBain v. Wallace*, 6 App. Cas. 608.

3 See definitions of sale in § 1.

4 *State v. Wentworth*, 35 N. H. 442, 443. In every sale there is a transfer or change of title from the vendor to the vendee, though there may be a transfer or change of title without a sale: *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279, 281.

5 See *Newcomb v. Cabell*, 10 Bush, 460, 463. A common-law sale is strictly a transaction operating as a present transfer of ownership, and does not include executory contracts for the future sale and delivery of personal property: *Cunningham v. Ashbrook*, 20 Mo. 553, 557.

6 See *Morse v. Sherman*, 106 Mass. 430, 434; *Reed v. Upton*, 10 Pick. 522, 524, 525.

7 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. And see *Riddle v. Varnum*, 20 Pick. 280, 283.

8 See *Cobb v. Tufts*, 2 Tex. Cond. Rep. (Civ. Cas.) § 152.

§ 6. *Classification of sales.*—*Varying with point of view.* Sales may be variously classified, according to the aspect from which the transfer is regarded.<sup>1</sup>

*Voluntary and forced.* Thus, a voluntary sale is one made freely without constraint by the owner of the thing sold.<sup>2</sup> A forced or involuntary sale is one made without the consent of the owner of the property,<sup>3</sup> by some officer appointed by law, as by a marshal or sheriff, in obedience to the mandate of a competent tribunal.<sup>4</sup> This kind of a sale is sometimes called a judicial sale;<sup>5</sup> and the term may be extended to sales by executors or administrators, guardians and trustees.<sup>6</sup>

*Private and public.* A private sale is one made voluntarily, and not by auction.<sup>7</sup> A public sale is one made at auction to the highest bidder.<sup>8</sup>

*Executory and executed.* There are executed or complete sales, whereby the property to the thing sold becomes vested in the buyer;<sup>9</sup> and there are executory sales, or rather sales resting in executory agreement, in which the property has not yet passed from the seller, because something yet remains to be done to complete the sale.<sup>10</sup>

*Oral and written.* Furthermore, sales may be oral or written (at least in outline), the latter being alone valid

or enforceible, by reason of the widely adopted statute of frauds,<sup>11</sup> for goods exceeding a prescribed value, in the absence of various acts of compliance deemed equivalent to written evidence of the contract.<sup>12</sup>

*Other divisions.* So sales may be absolute, as where they are free from any qualification in their creation and completion, or conditional,<sup>13</sup> because depending for their validity on the fulfillment of a contingency or condition;<sup>14</sup> they may be legal, as conforming to the law, or illegal, as in contravention of good morals, public policy, or statutory enactments;<sup>15</sup> they may be valid, as free from fraud, or impeachable for deception, concealment, or misrepresentation;<sup>16</sup> and they may be with warranty, where the quality or title of the goods is guaranteed, or they may lack such collateral stipulation.<sup>17</sup> Further divisions of contracts of sale, frequently noted, are into express and implied, the consent in the latter case being derived from acts and conduct rather than words;<sup>18</sup> and into entire or indivisible and severable contracts, as in the case of instalment sales.<sup>19</sup>

1 2 Schouler on Personal Property, § 202.

2 2 Bouvier Law Dict. tit. Sale (15th ed.) 606. This is the common case of sales, and to this class the general rules of the law of sales apply: 2 Bouvier Law Dict. tit. Sale (15th ed.) 606.

3 See *Peterson v. Hornblower*, 33 Cal. 266, 276; *Patterson v. Taylor*, 15 Fla. 336, 341. But compare *Lanahan v. Sears*, 102 U. S. 318.

4 2 Bouvier Law Dict. tit. Sale (15th ed.) 606. This sale has the effect to transfer all the rights the owner has in the property, but it does not, like a voluntary sale, guarantee a title to the thing sold: 2 Bouvier Law Dict. tit. Sale (15th ed.) 606.

5 Definitions of judicial sale: *Sturdevant v. Norris*, 30 Iowa, 71; *Williamson v. Berry*, 8 How. 547; *Winfield's Words*, etc. 342. See *Lawson v. De Bolt*, 78 Ind. 563, 564; 1 *Abbott's Law Dict.* 669.

6 2 Schouler on Personal Property, § 203. As forced sales may cover not only sales on execution, in bankruptcy, etc., but perhaps also sales by creditors in their own behalf, as in the instance of a mortgagee with a power of sale: 2 Schouler on Personal Property, § 203.

7 2 Bouv. Law Dict. tit. Sale (15th ed.) 606.

8 2 Bouv. Law Dict. tit. Sale (15th ed.) 606. Auction sales sometimes are voluntary, as when the owner chooses to sell his goods in this way, and then as between the seller and the buyer the usual



rules relating to sales apply ; or they are involuntary or forced, when the same rules do not apply : 2 Bouvler Law Dict. tit. Sale (15th ed.) 606.

9 2 Schouler on Personal Property, § 202. And see 2 Abbott's Law Dict. 441. A sale is also sometimes said to be executed when the contract is performed by the delivery of the thing and the payment of the price : See Story on Sales, § 231.

10 2 Schouler on Personal Property, § 203. And see 2 Abbott's Law Dict. 441 ; Reed v. Upton, 10 Pick. 522, 524. A sale is also said to be executory on one side when something remains to be done, not in the creation but in the performance of the contract, as delivery or payment : See Story on Sales, § 236.

11 29 Car. ii ch. 3. See title in Bouvler Law Dict. (14th ed.) 614.

12 See chapters relating to STATUTE OF FRAUDS. Although at common law consent alone was sufficient to constitute a valid sale, the statute of frauds has now intervened, and other formalities are prescribed to make the transfer valid : Cunningham v. Ashbrook, 20 Mo. 553, 558.

13 See 1 Abbott's Law Dict. 262.

14 2 Bouvler Law Dict. tit. Sale (15th ed.) 606. See Copland v. Bosquet, 4 Wash. C. C. 588, 592 ; Bigelow v. Huntley, 8 Vt. 151, 154 ; 2 Schouler on Personal Property, § 202 ; Story on Sales, § 246.

15 See chapter on ILLEGAL SALES.

16 See chapter on FRAUDULENT SALES.

17 See chapter on WARRANTY.

18 See Story on Sales, § 229.

19 See Story on Sales, § 240. So a sale may be for cash or on credit according as payment of the price is to be immediately made or postponed to a future time : See Ansted v. Sutter, 30 Ill. 164, 166 ; Turner v. Moore, 58 Vt. 455, 456, 3 Atl. Rep. 467. And there may be sales of specific things where the chattels are at once identified and appropriated to the contract, and sales of things not specific, or a sort of contract for the supply of chattels answering a particular description, but not yet identified and appropriated : 2 Schouler on Personal Property, § 202.



## CHAPTER II.

### SIMILAR TRANSACTIONS.

- § 7. Sale or assignment.
- § 8. Sale or preliminary negotiation.
- § 9. Sale or executory agreement.
- § 10. Sale or gift
- § 11. Sale or exchange.
- § 12. Difference in remedies.
- § 13. Sale of liquor by club.
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- § 19. Delivery under conditional sales.
- § 20. Privilege of purchase.
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- § 22. Sale or lease.
- § 23. Sale or pledge.
- § 24. Sale or mortgage.
- § 25. Sale or consignment.
- § 26. Remedies in such transactions.
- § 27. Sale or payment.
- § 28. Further distinctions.

§ 7. *Sale or assignment.*—*Transfer of any kind of property or interest.* The idea of an assignment is essentially that of a transfer by one existing party to another of some species of property or valuable interest.<sup>1</sup> In common parlance this word signifies the transfer of all kinds of property, real, personal, and mixed, and whether the same be in possession or in action, as a general assignment.<sup>2</sup>

*Transfer of interest in land.* In a more technical sense, it is usually applied to the transfer of a term of years, though it is more comprehensively used to signify a transfer of some particular estate or interest in land.<sup>3</sup>

*Transfer of goods and chattels.* And where an article of merchandise or a personal chattel is the subject of assignment, the act is more commonly termed a sale.<sup>4</sup>

*Transfer of chose in action, etc.* But in a narrower sense, and in regard particularly to other property than real estate, the term "assignment" is often confined in its application to a transfer of a *chose in action* or other species of incorporeal personal property.<sup>5</sup>

*Sale or assignment for benefit of creditors.* The general difference between a sale and an assignment for the benefit of creditors is stated to be, that in the former there is a fixed price, while in the latter there is a mere trust, and of course no fixed value given to the property.<sup>6</sup>

1 *Hight v. Sackett*, 34 N. Y. 451; *Winfield's Words*, etc. 50; 1 *Abbott's Law Dict.* 96.

2 *Ball v. Chadwick*, 46 Ill. 31. Common-law definition; *Cowles v. Ricketts*, 1 Iowa, 582, 585; 1 *Bacon's Abridgment*, 329; *Chase v. Walters*, 28 Iowa, 460, 464. And see *Perrins v. Little*, 1 Green, 243; *Potter v. Holland*, 4 Blatchf. 210.

3 *Ball v. Chadwick*, 46 Ill. 31; *Winfield's Words*, etc. 50.

4 *Burrill on Assignments*, § 1. And see 2 *Steph. Com.* (9th ed.) 45; *Carter v. Jarvis*, 9 Johns. 143. An assignment of goods at sea, and their proceeds, is sufficient to pass a legal title to the proceeds: *Hodges v. Harris*, 6 Pick. 360.

5 See *Schouler on Personal Property*, §§ 72-83; *Burrill on Assignments*, § 4. Consult, also, *Bump v. Van Orsdale*, 11 Barb. 634. An agreement to assign an insurance policy has been held not a contract of insurance, but of sale: *Dodd v. Jones*, 137 Mass. 322.

6 *Keller v. Tutt*, 31 Mo. 301, 306. Further points of distinction: *Burrill on Assignments*, § 4.

§ 8. *Sale or preliminary negotiation. — Distinction made.* A sale is to be distinguished from a negotiation preliminary to a contract,<sup>1</sup> as a mere proposition or offer to sell,<sup>2</sup> or a verbal promise to trade when the parties should meet, and then either to sell or buy.<sup>3</sup>

*Ground of distinction.* For there may be propositions which, when accepted or complied with, will ripen into a sale, or there may be agreements for a sale in the

future;<sup>4</sup> but these do not confer the rights or impose the obligations which arise from a contract of sale.<sup>5</sup>

1 See *Whitmore v. Alley*, 46 Me. 428, 431.

2 *Smith v. Weaver*, 90 Ill. 392, 393. Offer: See chapter on CONSENT.

3 *Whitmore v. Alley*, 46 Me. 428, 431. Such a transaction does not amount to an executory contract: *Whitmore v. Alley*, 46 Me. 428, 431.

4 Or executory contracts of sale: See § 9, on SALE OR EXECUTORY AGREEMENT.

5 *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174. Citing *Parsons on Mercantile Law*, 41; *Chamberlin v. Smith*, 44 Pa. St. 431.

§ 9. Sale or executory agreement.—*Agreement to sell and buy, etc.* In the phraseology of statutory enactments in some of the States,<sup>1</sup> an agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the sum from him, and to pay a price therefor.<sup>2</sup>

*Present or postponed transfer of title.* And in general, the distinction between a present sale,<sup>3</sup> called a "bargain and sale," at common law,<sup>4</sup> and a mere engagement for a future sale,<sup>5</sup> or executory agreement,<sup>6</sup> is that in the former the title passes, and the sale is absolute and complete,<sup>7</sup> while in the latter the title does not pass,<sup>8</sup> except on the performance of a precedent or concurrent condition,<sup>9</sup> or so long as something remains to be done in the way of specifically appropriating the goods sold to the contract.<sup>10</sup>

*Difference in buyer's remedies.* The proposed buyer in the case of an executory agreement has a right to have the ownership of the thing contracted to be sold, but if that be wrongfully denied to him, he has his remedy only in damages.<sup>11</sup> But in an executed sale the buyer, though the goods are not yet delivered to him, takes all the responsibilities of ownership, and in case of destruction by fire or other casualty, the loss falls on him.<sup>12</sup>

1 *Stims. Am. Stat. Law*, § 4561, p. 541.

2 *Cal. Civ. Code*, § 1729; *Dak. Civ. Code*, § 986. Agreement to sell defined: *Cal. Civ. Code*, § 1727; *Dak. Civ. Code*, § 984. Promise to sell in Louisiana: *Knox v. Payne*, 13 *La. An.* 361, 362. Agreement to buy defined: *Cal. Civ. Code*, § 1728; *Dak. Civ. Code*, § 985.

3 See *Martin v. Adams*, 104 *Mass.* 262.

4 See *McCrae v. Young*, 43 *Ala.* 622, 625.

5 See *Lounsedale v. Hunsaker*, 2 *Or.* 101, 103.

6 See *Cunningham v. Ashbrook*, 20 *Mo.* 553, 557.

7 See *Newcomb v. Cabell*, 10 *Bush*, 460, 468.

8 The former passes the title in the subject of the sale in the purchaser, while the latter gives no title, but simply creates a right: *Pomeroy's Article*, 4 *Johns. Cycl.* 1647.

9 See *Morse v. Sherman*, 106 *Mass.* 430, 434; *Shields v. Pettee*, 4 *N. Y.* 122, 124. And compare *Knox v. Payne*, 13 *La. An.* 361, 362.

10 See *Merchants' Nat. Bank v. Bangs*, 102 *Mass.* 291, 295; *Cunningham v. Ashbrook*, 20 *Mo.* 553, 556; also *Riddle v. Varnum*, 20 *Pick.* 280, 283. Distinction illustrated: *Low v. Andrews*, 1 *Story*, 38, 42. The thing sold must be specific or identified, and capable of delivery, otherwise the transaction is not strictly a contract of sale, but a special or executory agreement: 2 *Kent Com.* 468.

11 *Pomeroy's Article*, 4 *Johns. Cycl.* 1647. The same rule is applicable to the proposed seller should the expectant buyer refuse, without cause, to take the article at the stipulated time: *Pomeroy's Article*, 4 *Johns. Cycl.* 1647. See chapter on EXECUTORY SALES.

12 *Pomeroy's Article*, 4 *Johns. Cycl.* 1647. While in the executory contract an ownership remains in the seller, he must bear all such losses: *Pomeroy's Article*, 4 *Johns. Cycl.* 1647. See chapter on EXECUTORY SALES.

§ 10. *Sale or gift.—General difference.* A gift, as generally defined, differs from a sale in being a voluntary transfer without consideration.<sup>1</sup>

*Delivery and acceptance of gift.* Speaking comprehensively, it requires for its completion, delivery and acceptance, or legally equivalent acts.<sup>2</sup>

*Agreement to pay.* To make the delivery of goods a sale, however, there must be an agreement to pay, as otherwise it is a mere gratuity.<sup>3</sup> But an onerous gift is, when accepted, in the nature of a sale, if the burden it imposes is the payment of a sum of money.<sup>4</sup>

1 See *Gray v. Burton*, 55 *N. Y.* 68, 72; *Cal. Civ. Code*, § 1146; *Dak. Civ. Code*, § 639. A gift differs from a contract in not being based upon a consideration, which is essential to give a contract validity: *Art. Gift*, 2 *Johns. Cycl.* 547. A gift actually conferred is, in effect, an executed contract, while one merely promised is an invalid executory contract: *Art. Gift*, 2 *Johns. Cycl.* 547. See 2 *Schouler on Personal Property*, §§ 56, 57.

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<sup>2</sup> See Stims. Am. Stat. Law, § 4500 ; Chadsey v. Lewis, 1 Gilm. 153, 155.

<sup>3</sup> Commonw. v. Packard, 5 Gray, 101, 103.

<sup>4</sup> Bouvier Law Dict. tit. Sale (15th ed.) 606.

§ 11. **Sale or exchange.** — *Exchange and barter defined.* Generally speaking, exchange is a contract by which the parties give one thing for another, whatever it be, except money.<sup>1</sup> And barter is said to be that species of contract in which merchandise is exchanged for merchandise.<sup>2</sup>

*Difference in mode of payment of consideration.* A sale is declared to differ from a barter in this, that in the latter the consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation.<sup>3</sup> So the essential difference between a sale and an exchange is said to be this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter.<sup>4</sup> And where goods have been delivered by one party, and the other party agrees to deliver other goods of a similar quality, on demand, the transaction is held not a sale of the goods, but an agreement for an exchange.<sup>5</sup>

*Fixed price as criterion.* A more accurate perception of the distinction between a sale and an exchange is shown, however, by the declaration that an agreed price is essential to a proper bargain and sale, but altogether needless in the case of an exchange;<sup>6</sup> and when one piece of property is given for another without regard to value, that is an exchange.<sup>7</sup> But if property is taken at a fixed money price, the transfer amounts to a sale, whether the price is paid in cash or in goods.<sup>8</sup>

*Estimation by money standard.* For it is immaterial whether there be a money payment or not, provided the bargain be made and the value be measured in money terms.<sup>9</sup>

*Goods to be paid for in goods at certain price.* And where one party sold and delivered to another dry goods, which the latter agreed to pay for in nails at a certain price, to be delivered on or before a future day specified, this was held a purchase of dry goods on credit, to be thereafter paid for in nails at a fixed price, and not a purchase of nails to be paid for in dry goods, nor even an exchange of dry goods for nails.<sup>10</sup>

*Money as part of consideration.* So, when a thing has been exchanged for another thing and a sum of money, the contract is often regarded as a sale to the extent of the money consideration.<sup>11</sup> Thus, it is declared that when property is transferred at a fixed price agreed upon, and money and other property received in payment, the transaction will, in the absence of express evidence that an exchange only was intended, be deemed a sale rather than an exchange.<sup>12</sup> But a transaction is not a sale whereby the owner of a number of objects transfers them to another in consideration of the same number of like objects and a specified sum in money, where no price is attached, and no value measured in money terms.<sup>13</sup>

1 See La. Civ. Code, art. 2660. And compare Cal. Civ. Code, § 1807; Dakota Civ. Code, § 1029. Mutual grant of equal interests: 2 Blackst. Com. 323; Wilcox v. Randall, 7 Barb. 633, 638. Preceded buying, etc.: Anon, 3 Salk. 157.

2 1 Abbott's Law Dict. 457.

3 Commonw. v. Davis, 12 Bush, 240, 241. A barter is said to be always of goods for goods, while a sale is of goods for money, or for money and goods: 1 Bouvier Law Dict. (14th ed.) 191. Sale or barter of liquor for pool-checks: Massey v. The State, 74 Ind. 368. And compare Stevenson v. The State, 65 Ind. 409. Of intoxicating liquor, election concerning: Ex parte Beaty, 1 S. W. Rep. (Tex.) 451.

4 Commonw. v. Clark, 14 Gray, 367, 372. And see Mitchell v. Gile, 12 N. H. 390, 395; 2 Blackst. Com. 446.

5 Mitchell v. Gile, 12 N. H. 390, 395.

6 Loomis v. Walnwright, 21 Vt. 520.

7 Picard v. McCormick, 11 Mich. 68, 70.

8 Picard v. McCormick, 11 Mich. 68, 70. In a sale there is a fixed price, while in a barter there is not: 1 Bouvier Law Dict. (14th ed.) 191.

9 Gunter v. Lecky, 30 Ala. 591, 596.

10 Herrick v. Carter, 56 Barb. 41, 44, 45.

11 See Furniss' Succession, 34 La. An. 1013; Forsyth v. Jervis, 1 Stark. 437, 439; Sheldon v. Cox, 3 Barn. & C. 420; Hands v. Burton, 9 East, 349, 350.

12 Loomis v. Wainwright, 21 Vt. 520.

13 Gunter v. Lecky, 30 Ala. 591, 597.

§ 12. *Difference in remedies.*—*Averment of "sale" for "exchange."* Strictly speaking, an averment of a contract of "sale" is not supported by proof of an "exchange."<sup>1</sup>

*Common counts or special agreement.* And there is this difference between the remedies for the breach of a contract of sale and one of exchange, that in the latter case, as generally held, the declaration cannot be framed under the common counts for goods sold and delivered, but must be based on the special agreement.<sup>2</sup>

*Equivalent other than money.* So in general, where goods are sold to be paid for wholly or in part by goods, or by the other party's labor, or otherwise than in money, the action must be for a breach of the agreement, and not for goods sold and delivered.<sup>3</sup>

1 Vail v. Strong, 10 Vt. 457, 465.

2 See Mitchell v. Gile, 12 N. H. 390, 391; Harrison v. Luke, 14 Mees. & W. 139, 141; Reed v. Hutchinson, 3 Camp. 352, 353. But compare *contra*, Way v. Wakefield, 7 Vt. 223; Wainwright v. Straw, 15 Vt. 215, 219; Kent v. Bowker, 38 Vt. 148, 150, 152.

3 Mitchell v. Gile, 12 N. H. 390, 392. And compare Keys v. Harwood, 2 Com. B. 905, 907. But see Clark v. Fairfield, 22 Wend. 522; Kent v. Bowker, 38 Vt. 148, 150.

§ 13. *Sale of liquor by club.*—*For consumption off the premises, etc.* The sale of liquor by a club to its members<sup>1</sup> through a manager for consumption off the premises, and at a profit turned into the common fund, is a transfer of property, but not a sale within the meaning of a statute prohibiting any person from selling intoxicating liquors by retail without a license.<sup>2</sup>

*Payment in checks, etc.* Nor is there necessarily and as a matter of law an indictable sale of intoxicating



liquors by the agent of a club to its members, irrespective of the consideration whether the arrangement was colorable, and an evasion of the statute, where payment was made in five-cent checks, and the surplus liquor was the agent's recompense.<sup>3</sup>

*Counter views.* But on the other hand, it is declared that since a man even at common law may sell to himself and another, every element of a sale is present in the transaction, where the members of a club were with others permitted to take beer at its rooms on presenting a five-cent check for each glass.<sup>4</sup>

1 See *Commonw. v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340. Subject discussed: 32 Am. Rep. 433; 22 Am. Law Reg. 102.

2 *Graff v. Evans*, L. R. 8 Q. B. D. 373; S. C. 22 Am. Law Reg. 99.

3 *Commonw. v. Smith*, 102 Mass. 144. And see *Commonw. v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419.

4 *U. S. v. Wittig*, 2 Low. 466. And see *Marmont v. State*, 48 Ind. 21; *Rickart v. People*, 79 Ill. 85; *State v. Mercer*, 32 Iowa, 405.

§ 14. *Sale or bailment. — Transfer of special property.* A transfer only of the special property and not of the general or absolute title is not a sale of the thing,<sup>1</sup> though it may be a bailment.<sup>2</sup>

*Restoration of identical or of equivalent thing.* A recognized distinction between bailment and sale has been stated to be, that when the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed.<sup>3</sup> But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, the title to the property is changed, and the transaction is a sale.<sup>4</sup>

*Applications of distinction.* And this distinction has been applied, so as to make out a sale, to a warehouseman's receipt for grain in store, with an agreement at a

stipulated price,<sup>5</sup> and to a delivery of animals to be returned at a specified date "as good and in as good condition and age as when taken."<sup>6</sup>

*Delivery to agents, etc., and where title reserved.* But the principle that a delivery of goods to one to be returned, or something else in their stead, at the option of the receiver, constitutes a sale, does not apply to an entrustment to agents and factors.<sup>7</sup> And the party receiving the property is a mere bailee, when by a writing given by him at the time, he admits that the title is in the party delivering it, and agrees that it shall so continue till the price is fully paid, and meanwhile to use the property in a particular way.<sup>8</sup>

1 Cobb v. Tufts, 2 Tex. Cond. Rep. (Civ. Cas.) § 152. And see Woods v. Half, 44 Tex. 633, 635.

2 See Boston etc. R. R. Co. v. Warrior Mower Co. 73 Me. 251, 230; Belden v. Perkins, 78 Ill. 449, 454; Whitaker v. Sumner, 20 Pick. 399, 405.

3 Mallory v. Willis, 4 N. Y. 76, 85. And see other cases next cited.

4 Mallory v. Willis, 4 N. Y. 76, 85; Foster v. Pettibone, 7 N. Y. 433; 57 Am. Dec. 531. And see Lonergan v. Stewart, 55 Ill. 45, 49; 2 Kent Com. 589, 590; South Australian Ins. Co. v. Randall, Law R. 3 P. C. 101, 109, 113; Chase v. Washburn, 1 Ohio St. 244, 249; 59 Am. Dec. 623; Grier v. Stout, 2 Ill. App. 602, 606; Moore v. Holland, 39 Me. 307.

5 Grier v. Stout, 2 Ill. App. 602, 603.

6 Reed v. Abbey, 2 Thomp. & C. 380. And compare Bartlett v. Wheeler, 44 Barb. 162, 163; Grant v. Williams, 6 Fred. 341, 342.

7 Blood v. Palmer, 11 Me. 414, 420; 26 Am. Dec. 547, 550.

8 Crocker v. Gullifer, 44 Me. 491, 492, 494.

§ 15. *Arrangements with millers.*—*Return of specified proportions of flour, etc.* The transaction has usually been held a sale and not a bailment, where wheat is sent to a miller upon a contract not to return the identical wheat or keep it separate from other wheat, but that the sender may have as much flour as it would make, or a specified proportion of flour for each bushel of wheat, or under some similar arrangement.<sup>1</sup>

*Corn to be used as part of current consumable stock, etc.* So the transaction has been considered a sale and

not a bailment, where corn was deposited by farmers with a miller, to be stored and used as part of the current consumable stock or capital of the miller's trade, subject to the right to claim at any time an equal quantity of corn of like quality, or the market price therefor, less charges, on the day of demand.<sup>2</sup>

*No right reserved to return or recall, etc.* And an arrangement with a miller to deliver wheat to him, to be paid for on delivery, or at any subsequent time when payment shall be demanded, and with an understanding that the miller may use it in his milling business, is a sale absolute, if no right is reserved to recall or return it.<sup>3</sup>

*When mere bailment.* But it has been held that a contract, whether verbal or written, between parties depositing wheat, and a miller and warehouseman agreeing to store it until a certain date, is not a *mutuum* or exchange, nor a sale of the wheat, but a bailment, pure and simple, when it was stipulated that the wheat might be sold at pleasure before that date, or that wheat would be returned if called for.<sup>4</sup>

1 See *Carlisle v. Wallace*, 10 Ind. 252, 253; *Smith v. Clark*, 21 Wend. 83; 34 Am. Dec. 213, 214, 215; *Norton v. Woodruff*, 2 N. Y. 153, 156; *Tilt v. Silverthorne*, 11 Up. Can. Q. B. 619, 620. But compare *Seymour v. Brown*, 19 Johns. 44; *Slaughter v. Green*, 1 Rand. 3; 10 Am. Dec. 488; *Foster v. Pettibone*, 7 N. Y. 433; 57 Am. Dec. 530, 531; *Mallory v. Willis*, 4 N. Y. 76, 79; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430; *Chase v. Washburn*, 1 Ohio St. 244, 251; 59 Am. Dec. 623; *Stephenson v. Ranney*, 2 Up. Can. C. P. 196.

2 *South Australian Ins. Co. v. Randell*, Law R. 3 P. C. 101, 107; Fully noted: *Rahilly v. Wilson*, 3 Dill. 420, 427. But compare *Isaac v. Andrews*, 28 Up. Can. C. P. 40, 43. And see *Benedict v. Ker*, 29 Up. Can. C. P. 410, 412.

3 *Jones v. Kemp*, 49 Mich. 9, 10.

4 *Schindler v. Westover*, 99 Ind. 395, 400. Distinguished, *Lyon v. Lenon*, 7 N. E. Rep. (Ind.) 311. Compare *Andrews v. Richmond*, 34 Hun, 20. Storage receipts: *Ives v. Hartley*, 51 Ill. 520, 523. And see *Benedict v. Ker*, 29 Up. Can. C. P. 410, 412. But compare *Dean v. Lammers*, 63 Wis. 331, 336; *Bailey v. Bensley*, 87 Ill. 556, 560.

§ 16. Deposits in grain elevators.—*Conflicting lines of cases.* The rule followed by one line of cases with re-

gard to deposits in warehouses and grain elevators, or similar receptacles, is that the dominion over the property passes to the depositary, and the transaction is a sale, not a bailment,<sup>1</sup> if the wheat be thrown into the common mass, with the understanding or agreement that the person receiving it may take from it at pleasure, and appropriate the wheat so taken to the use of himself or others, on the condition of his procuring other wheat to supply its place.<sup>2</sup> On the other hand, the doctrine of a different line of cases, as lately formulated, is that the contract is one of bailment and not of sale, where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own and that received from other depositors, and sells from this receptacle, but always reserves enough to answer the demand of each owner.<sup>3</sup>

*Intermediate view.* The intermediate general proposition said to be asserted in some of the cases is that where grain is deposited with any person with the understanding that he may use it on his own account, and when the depositor desires to sell, that the other will pay the highest price, or return a like quantity or quality, in such cases the transaction, if not an immediate sale, is a sale at the option of the receiver.<sup>4</sup>

*Latest test suggested.* And under the latest test suggested, the transaction is a bailment if the depositor, by his contract, can compel a delivery of grain, but is a sale if the dealer has an option to pay either in grain or in money;<sup>5</sup> and the dealer becomes the owner of the grain, and is liable to pay for it whenever called upon, if it is received under a contract, either express or implied, to pay the person delivering it the market price whenever he chooses to demand it, and is mixed with other grain of like quality, in bins, from which shipments are made daily, where there is no understanding

that the owner shall have the right to demand either his own, or a like quantity of other grain in return.<sup>6</sup>

1 See citations in next note.

2 *Chase v. Washburn*, 1 Ohio St. 244, 252; 59 Am. Dec. 623, 629. And see *Loneragan v. Stewart*, 55 Ill. 44, 47; *Richardson v. Olmstead*, 74 Ill. 213, 216; *Johnston v. Browne*, 37 Iowa, 200; *Fishback v. Van Dusen*, 33 Minn. 111; *Andrews v. Richmond*, 34 Hun, 20, 24.

3 *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 730; *Battenberg v. Nixon*, 97 Ind. 106. And see *Nelson v. Brown*, 53 Iowa, 555; *Sexton v. Graham*, 53 Iowa, 181, 192. Compare *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Rep. 119. Consult further 2 Kent Com. (12th ed.) 365, 396; 6 Am. Law Rev. 450; 19 Cent. L. J. 269.

4 *Ledyard v. Hibbard*, 48 Mich. 421, 426; 42 Am. Rep. 474. And see *Nelson v. Brown*, 44 Iowa, 455.

5 *Lyon v. Lenon*, 7 N. E. Rep. (Ind.) 311; 22 The Reporter, 518.

6 *Lyon v. Lenon*, 7 N. E. Rep. (Ind.) 312; 22 The Reporter, 518.

§ 17. **Delivery for resale.**—*Return of money or property.* In a case where property was not taken on commission, or in any event to be returned, it was laid down that when property is sold and delivered to be paid for upon a resale, the purchaser must either return the money or the property, whatever may happen in the mean while.<sup>1</sup> And if the property is not returned in a reasonable time, a resale will be presumed.<sup>2</sup> The lapse of time in such cases does not act upon the character of the original transactions, converting a bailment into a sale and transfer of title,<sup>3</sup> but upon the consideration, determining its maturity from a presumed resale within a reasonable time.<sup>4</sup>

*Action of accredited agent.* There can be recovery, as upon an absolute sale of goods, where they were delivered under an agreement to sell them as an accredited agent of a party, and to return those unsold at a certain time, but none were returned at or before that time.<sup>5</sup>

*Receipt or memorandum indicating sale.* And a receipt for fish, to be paid for when sold at a specified price, is evidence of a sale of the fish on the designated terms, and not of a bailment.<sup>6</sup>

*Recipient becoming factor, etc.* But the transaction has been held not a sale passing the title, but a mere bailment, where the arrangement was such that the party receiving the goods did not take them in his own right, but became the factor or agent of the party delivering them.<sup>7</sup>

1 *Blow v. Spear*, 43 Mo. 496, 498.

2 *Blow v. Spear*, 43 Mo. 496, 498. And see *McArthur v. Wilder*, 3 Barb. 66.

3 Transfer of title : See subsequent chapter of book.

4 *Blow v. Spear*, 43 Mo. 496, 498.

5 *Griffin v. Keith*, 1 Hilt. 58. Compare *Marsh v. Wickham*, 14 Johns. 167, 169.

6 *McArthur v. Wilder*, 3 Barb. 66. A memorandum has also been held to import a sale of a number of shares of stock, where it set forth the receipt thereof for a specified sum paid, upon an understanding that the signer was to give the other party one half of whatever price the stock was sold for, over and above the sum paid: *Jones v. Kent*, 45 N. Y. Sup. Ct. 66, 63.

7 *Blood v. Palmer*, 11 Me. 414, 418 ; 26 Am. Dec. 547. And see *Morss v. Stone*, 5 Barb. 515, 518.

§ 18. *Delivery to manufacturer. — Obligation to restore identical or equivalent things.* Application has been made in a case where materials were delivered to a manufacturer, of the distinction between the obligation to restore the specific things, and the obligation to restore things of the like kind and value,<sup>1</sup> which is said to hold good in cases of hiring as well as in cases of deposits and gratuitous loans.<sup>2</sup>

*Transaction between merchant and tanner.* And a transaction between a merchant and a tanner is a sale, so that the property may be seized in execution by the tanner's creditors, where hides are delivered by the merchant to the tanner under a contract that they are to be charged at cost and a certain commission, and interest after a specified period, and when tanned are to be returned to the party delivering them, who is to sell them, and after deducting the cost, commission, and guaranty of solvency, to pay the balance to the tanner.<sup>3</sup>

*Cloth left with tailor.* So where one buys cloth at a sheriff's sale, and leaves it with a tailor, to be made up for the latter's own profit, he accounting to the purchaser only for the price of the cloth, it is a sale to such tailor at a certain stipulated price,<sup>4</sup> and not a hiring nor a loan, nor any other bailment or contract.<sup>5</sup>

*Contract with powder company.* And a contract with a powder company has been construed to imply title in the manufacturer, where by such contract the company agrees to supply the inventor and patentee of an explosive compound called "dualin," with advances of cash and materials to be "charged to him" against manufactured goods "consigned" to them for sale, and for which they desired to secure the exclusive selling agency, the principal design being expressed to be to control the demand for the "joint interest" of the parties.<sup>6</sup>

1 *Grier v. Stout*, 2 Ill. App. 602, 606.

2 *Grier v. Stout*, 2 Ill. App. 602, 606. And see *Chase v. Washburn*, 1 Ohio St. 246, 249; 59 Am. Dec. 323; *Story on Bailments*, § 439; *Longergan v. Stewart*, 55 Ill. 44, 49; *Holbrook v. Armstrong*, 10 Me. 31, 34.

3 *Jenkins v. Eichelberger*, 4 Watts, 121; 28 Am. Dec. 691, 692. And see *Prichett v. Cook*, 62 Pa. St. 193, 197; *Butterfield v. Lathrop*, 71 Pa. St. 225, 229, 230. Compare *Johnson v. Ensign*, 4 Atl. Rep. (Pa.) 37.

4 *Dick v. Lindsay*, 2 Grant Cas. 431, 435, 436.

5 *Dick v. Lindsay*, 2 Grant Cas. 431, 435, 436.

6 *Dittmar v. Norman*, 118 Mass. 319, 324. And see *Powder Co. v. Burkhardt*, 97 U. S. 110, 116, 120. Compare *Wood v. Orsen*, 25 N. Y. 348, 349; *Smith v. James*, 7 Cowen, 328, 330; *Schenck v. Saunders*, 13 Gray, 37, 41; *Mansfield v. Converse*, 8 Allen, 182, 184.

§ 19. **Delivery under conditional sale.**—*Payment as condition precedent.* It is the general doctrine that where a sale is made, and possession delivered to the vendee upon the express condition that the title to the thing is to remain in the vendor until the purchase price be paid, such payment is strictly a condition precedent,<sup>1</sup> and until performance thereof, the sale is incomplete, and the right of property is not vested in the vendee.<sup>2</sup> Such

a vendee is deemed only a bailee for a specific purpose,<sup>4</sup> who has merely a bare right of possession, and having no title to the property can pass none to others.<sup>3</sup>

*Transferable interest, etc., under Pennsylvania doctrine.* But in Pennsylvania, a delivery on a conditional sale, the property to remain in the vendor until the goods are paid for, with right to reclaim them, is void as respects the vendee's creditors, or an innocent purchaser from the vendee.<sup>4</sup> And it is there held that such an arrangement confers a transferable interest, and is something more than a bailment, since the title would pass the instant of payment.<sup>5</sup> The distinction drawn is between a present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment, the vendor may recover possession of the property, which transaction is a contract invalid as to creditors,<sup>6</sup> and a bailment for use, or as it is sometimes called, a lease of the property,<sup>7</sup> coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price, which transaction is valid as against third parties as well as between those immediately concerned.<sup>8</sup> And it is laid down that whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale, and not a bailment.<sup>9</sup>

1 Cobb v. Tufts, 2 Tex. App. (Civ. Cas.) § 152.

2 Cobb v. Tufts, 2 Tex. App. (Civ. Cas.) § 152. See Ridgway v. Kennedy, 56 Mo. 24, 25; Hanway v. Wallace, 18 Ind. 377, 379; Hotchkiss v. Hunt, 49 Me. 213, 219; Coghill v. Hartford etc. R. R. Co. 3 Gray, 515, 546; S. C. Langdell's Cases on Sales, 713, 714; Ballard v. Burgett, 40 N. Y. 314, 315; S. C. Langdell's Cases on Sales, 730.



• 3 Coggill v. Hartford etc. R. R. Co. 3 Gray, 545, 548; Langdell's Cases on Sales, 713, 715.

4 Krause v. Commonw. 93 Pa. St. 418, 421. And the vendor's right as against the vendee's creditors, is regarded as a secret and invalid lien for the purchase money: Haak v. Lindeman, 64 Pa. St. 499, 501; 37 Am. Rep. 661.

5 Krause v. Commonw. 93 Pa. St. 418, 421.

6 Forrest v. Nelson, 108 Pa. St. 481, 486; S. C. 19 The Reporter, 380, 381; S. C. 32 Alb. L. J. 260.

7 See Dando v. Foulds, 105 Pa. St. 74, 76.

8 Forrest v. Nelson, 108 Pa. St. 481, 486; S. C. 19 The Reporter, 380, 381. Following Haak v. Lindeman, 64 Pa. St. 499; 37 Am. Rep. 661; Stadtfeldt v. Huntsman, 92 Pa. St. 53; Brunswick etc. Co. v. Hoover, 95 Pa. St. 508.

9 Forrest v. Nelson, 108 Pa. St. 481, 488; S. C. 19 The Reporter, 380, 382. And while it is good as between the parties themselves, it is worthless as to creditors and *bona fide* purchasers from the transferee without notice: Forrest v. Nelson, 108 Pa. St. 481, 488.

§ 20. Privilege of purchase. — *Keeping chattel or paying for its use.* Where by a contract the vendee receives a chattel to keep for a certain time, and then to become the owner thereof, if he has paid the stipulated price, but if otherwise, to pay for its use, the vendee receives it as bailee, and the property is not changed until the price is paid.<sup>1</sup> And a contract is a bailment for hire, and not a conditional sale, by which a yoke of cattle was delivered to another, to keep and work in a farmer-like manner for one year, and then to be returned, with the privilege to pay a price named and keep the cattle, another animal being delivered at the time for the use of the cattle.<sup>2</sup> At most, there is said to be in such a case an agreement for a future sale, or rather, an offer to sell, with time given for its acceptance.<sup>3</sup>

*Option to purchase or to return.* But an option on the part of the buyer to purchase if he likes, is essentially different from an option to return a purchase if he should not like.<sup>4</sup> In the one case, the title will not pass until the option is determined, while in the other the property passes at once, subject to the right to rescind and return.<sup>5</sup>

1 *Enlow v. Klein*, 79 Pa. St. 488, 490. Quoting and following *Rose v. Story*, 1 Barr. 190. Citing to same effect, *Clark v. Jack*, 7 Watts & S. 375; also *McCullough v. Porter*, 4 Watts & S. 177; *Lehigh Co. v. Field*, 8 Watts & S. 323; *Rowe v. Sharpe*, 51 Pa. St. 346; *Becker v. Smith*, 9 Pa. St. 469. Distinguishing *Martin v. Mathiot*, 14 Serg. & R. 214. Compare *Crist v. Kleber*, 79 Pa. St. 290, 292.

2 *Chamberlain v. Smith*, 44 Pa. St. 431, 433.

3 *Chamberlain v. Smith*, 44 Pa. St. 431, 434.

4 *Hunt v. Wyman*, 100 Mass. 198, 200.

5 *Hunt v. Wyman*, 100 Mass. 198, 200.

§ 21. *Privilege of return.*—*Option to return or pay, etc.* Where a party to whom an article is delivered has the option to return the article or pay its value in money, the property passes, and the transaction is not a bailment but a sale or exchange.<sup>1</sup> For the rule of law is said to be well established that when a chattel is delivered by one person to another, who has an election to return it, or to pay for it, or to return some other property as a compensation for it, such chattel becomes the property of the person so receiving it.<sup>2</sup>

*Dissatisfaction with contemporaneous trade.* And a transaction has been held to amount to a sale instead of a technical bailment where there was a delivery of animals to be returned, or their value, unless the party receiving them should be dissatisfied with another contemporaneous trade, in which case they were to remain his property forever.<sup>3</sup>

*Waiver of right to insist upon return.* So there may be a waiver of the right to insist upon the return of an article loaned, by allowing the stipulated option and accepting the value of the article, partly in due bills, thus treating the transaction as a sale and the amount due as a debt.<sup>4</sup>

1 *Holbrook v. Armstrong*, 10 Me. 31, 34. And see *Buswell v. Bicknell*, 17 Me. 344, 347; *Perkins v. Douglass*, 20 Me. 317, 318; *McKinney v. Bradlee*, 117 Mass. 321, 322. Bailment for safe-keeping, sale, or return: *Middleton v. Stone*, 111 Pa. St. 589.

2 *Walker v. Blake*, 37 Me. 373, 375.

3 *Holbrook v. Armstrong*, 10 Me. 31, 34. Compare *Fuller v. Buswell*, 34 Vt. 107, 109, 110.

4 *Person v. Civer*, 28 How. Pr. 139, 141.

§ 22. *Sale or lease.*— *Conveying whole interest.* Where that which purports to be a lease conveys the whole interest of the lessor, as on a lease of coal until no coal remains, it differs in no respect from a sale.<sup>1</sup>

*Sale under guise of renting.* And agreements have generally been held to amount to sales, passing the title to the vendee, though purporting to be contracts for renting articles, such as pianos, sewing-machines, etc., usually taken on the instalment plan, where the price and terms of payment show that the real transaction was intended to be a sale, and was such a contract, and that the device of calling it a renting was resorted to in order to secure the payment of a balance of the purchase money.<sup>2</sup>

*Formalities of lease lacking.* So an agreement or note for the renting of an organ, with the understanding that on payment of all the rent a bill of sale of the organ shall be given, which agreement is not in the form of a lease, and does not contain the usual stipulations of such an instrument, and is not signed by the apparent lessor, is a conditional sale of the organ, and not a lease thereof.<sup>3</sup>

*Unrecorded instrument construed as sale.* And where, in the instrument of conveyance, the form of a lease is used to cover the real transaction, and the sums stipulated to be paid are for rent, but the total instalments would amount to more than was likely to be paid for the use of the property, the arrangement will be regarded as a sale;<sup>4</sup> and if unrecorded, is liable in Illinois to be defeated as fraudulent by creditors of the vendee in possession.<sup>5</sup>

*Lease giving privilege of purchase.* But in Missouri, a written contract purporting to be a lease of an organ, conditioned for the payment of rent monthly, and giving the privilege of purchasing at any time during the

continuance of the lease, at a price fixed, in which event all previous payments should be deducted, has been held no sale, where the title was expressly reserved, but a lease, with the privilege of purchase within the period for which the organ was let.<sup>6</sup>

*Distinction in Pennsylvania.* And in Pennsylvania, contrary to what has been declared the weight of authority,<sup>7</sup> a distinction is made between a present sale and delivery of personal property, coupled with an agreement that the title shall not vest in the latter, unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession, which transaction is invalid as to creditors,<sup>8</sup> and a bailment for use, or as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon, which transaction is good, both between the parties and as against creditors.<sup>9</sup>

1 Sanderson v. Scranton, 105 Pa. St. 469, 473.

2 See Greer v. Church, 13 Bush, 433; Knittel v. Cushing, 57 Tex. 354; 44 Am. Rep. 598, 600; Singer Manuf. Co. v. Cole, 4 Lea, 439; 40 Am. Rep. 21; Lucas v. Campbell, 88 Ill. 447, 449; 31 Am. Rep. 81; Price v. McCallister, 3 Grant Cas. 248; Singer Manuf. Co. v. Graham, 8 Or. 17; 34 Am. Rep. 572.

3 Hine v. Roberts, 48 Conn. 268, 269; 40 Am. Rep. 170.

4 Hervey v. Locomotive Works, 93 U. S. 664.

5 Hervey v. Locomotive Works, 93 U. S. 664. And see Fosdick v. Schall, 99 U. S. 235, 250; Heryford v. Davis, 102 U. S. 235, 244.

6 Sumner v. Cotley, 71 Mo. 121. Compare Kohler v. Hays, 41 Cal. 455, 453.

7 See Cole v. Berry, 13 Vroom, 308; 36 Am. Rep. 511, 517.

8 See citations in next note.

9 Forrest v. Nelson, 108 Pa. St. 481; 19 The Reporter, 380, 381. And see Stadtfeld v. Huntsman, 92 Pa. St. 53; 37 Am. Rep. 661, n. 664; Brunswick and Balke Co. v. Hoover, 95 Pa. St. 508; 49 Am. Rep. 674; Edward's Appeal, 105 Pa. St. 103.

§ 23. *Sale or pledge.*—*Sale and not pledge or mortgage.* A transaction may be a sale and not a pledge or mortgage, although there is an agreement that the ex-

cess on a resale should be credited to the original seller ;<sup>1</sup> and an assignment of a mortgage by a bank officer to a person who agrees to resell it to the bank, if the latter afterwards wishes to buy it, has been held a conditional sale of the mortgage, with a reservation of the right of repurchase, and not a pledge or equitable mortgage of it.<sup>2</sup>

*Pledge and not sale.* But there is a pledge and not a sale of chattels, where they are delivered to a party as indemnity for suretyship ;<sup>3</sup> or to secure the payment of a debt for work, with power to sell and satisfy the debt out of the proceeds ;<sup>4</sup> or when a bill of sale of personal property is taken at a price less than the estimated value of the property, with an agreement that the original owner shall have the same again at any time after a fixed day, upon refunding the price, etc. ;<sup>5</sup> or, according to a class of cases, where a receipted bill of parcels is given, accompanied with a formal delivery, and designed to constitute security for a debt.<sup>6</sup>

*Parol evidence to show pledge.* The weight of authority has been declared to be, as regards regular and formal bills of sale, that parol testimony might properly be received, even at law, where it is blended with equity in the practice, to show that the sale evidenced by such instruments was not absolute, but by way of security or pledge.<sup>7</sup> Yet the rule that parol evidence is inadmissible to prove that a sale or conveyance in writing which is absolute in its terms was not intended to be absolute, but was given as a pledge or mortgage, is well established in some of the States,<sup>8</sup> in regard to actions at law ;<sup>9</sup> but it does not apply to a mere bill of parcels ;<sup>10</sup> nor to a suit in equity ;<sup>11</sup> nor where the title to the property is not directly in issue.<sup>12</sup>

1 Reeves v. Seeburn, 16 Iowa, 237.

2 Commonw. v. Reading Savings Bank, 137 Mass. 431, 443. Sale and giving in payment, and not pledge, in Louisiana: Pomez v. Camors, 36 La. An. 464, 465.

- 3 *Morgan v. Dodd*, 3 Colo. 553.
- 4 *Houser v. Kemp*, 3 Pa. St. 208, 210.
- 5 *Kimball v. Hildreth*, 8 Allen, 167.
- 6 *Shaw v. Wilshire*, 65 Me. 485, 492. And see *Eastman v. Avery*, 23 Me. 248; *Beeman v. Lawton*, 37 Me. 543; *Whitaker v. Sumner*, 20 Pick. 399; *Hazard v. Loring*, 10 Cush. 267; *Walker v. Staples*, 5 Allen, 34.
- 7 *Jones v. Rahilly*, 16 Minn. 323, and cases cited.
- 8 *Newton v. Fay*, 10 Allen, 505, 507.
- 9 *Harper v. Ross*, 10 Allen, 372; *Pennock v. McCormick*, 120 Mass. 275, 277; *Philbrook v. Eaton*, 134 Mass. 395, 400.
- 10 *Hazard v. Loring*, 10 Cush. 267, 268; *Hildreth v. O'Brien*, 10 Allen, 104.
- 11 *Newton v. Fay*, 10 Allen, 505, 508.
- 12 *Reeve v. Dennett*, 137 Mass. 315, 316. And see *Howard v. O'Dell*, 1 Allen, 85; *Blanchard v. Peasing*, 4 Allen, 118, 120.

§ 24. *Sale or mortgage.—Intention as criterion.* In determining whether an instrument is a conditional sale or a mortgage, where the language of the instrument is equivocal, the true criterion seems to be the intention of the parties, as evinced by the whole transaction and the attendant circumstances.<sup>1</sup>

*Conditional sale rather than mortgage.* And the transaction has usually been held a conditional sale rather than a mortgage, when the relation of debtor and creditor is not created by the transaction and never existed, and the vendee takes and retains possession of the property, and its value is not perceptibly in excess of the consideration paid, and there is nothing to indicate an intent to transfer the property as a mere security.<sup>2</sup>

*Discharge of debt as test.* So the test laid down in regard to grants of land, said to be found in the question whether the debt was discharged or not by the conveyance,<sup>3</sup> has been considered to apply as well to sales and assignments of chattels.<sup>4</sup>

*Right of repurchase or redemption.* In considering transactions involving the right of repurchase,<sup>5</sup> a mortgage and a conditional sale have been said to be nearly allied to each other,<sup>6</sup> the difference between them being

said to consist in this, that the former is a security for a debt, while the latter is a purchase accompanied by an agreement to resell on particular terms.<sup>7</sup> And it has been laid down that whenever a transaction in the form of an instrument which may be regarded as a bill of sale, resolves itself into a security for a debt, it is a mortgage, provided the right of redemption exists.<sup>8</sup>

1 Rockwell v. Humphreys, 57 Wis. 410, 414.

2 Rockwell v. Humphreys, 57 Wis. 410, 414, and cases cited. See, also, Cook v. Lion Fire Ins. Co. 7 Pacif. Rep. (Cal.) 784; Russell v. Harkness, 7 Pacif. Rep. (Utah) 865.

3 See Stephen v. Cushman, 35 Ill. 186.

4 Glass v. Doane, 15 Ill. App. 66.

5 Sale with right of repurchase: Cook v. Lion Fire Ins. Co. 7 Pacif. Rep. (Cal.) 784.

6 See citations in next note.

7 Turner v. Kerr, 44 Mo. 429, 431. And see Logwood v. Hussey, 60 Ala. 417. Compare Mahler v. Schloss, 7 Daly, 291.

8 Wilmerding v. Mitchell, 42 N. J. L. 476, 479. And see Cooper v. Brock, 41 Mich. 488, 490; Smith v. Beattie, 31 N. Y. 542, 544. But compare Clayton v. Hester, 80 N. C. 275.

§ 25. *Sale or consignment.*—*Contract importing consignment and not sale.* A consignment of goods for sale, and not a sale of them, is imported if the contract is that one party shall take goods from the other, and return periodically the amount of sales, at the prices charged by the consignor, who will furnish the consignee with all goods in his line.<sup>1</sup>

*No relation of principal and agent.* But the relation of the parties is not that of principal and agent, if the consignee is at liberty according to the contract between him and his consignor to sell at any price he likes, and receive payment at any time he likes, though he is to be bound, if he sells the goods, to pay the consignor for them, at a fixed price and a fixed time.<sup>2</sup>

*Sale and not consignment.* And there is a sale where a consignment is made of goods to be paid for at a price agreed upon, but which bears no relation to the prices

at which the consignees might sell, or the amounts they might be able to collect.<sup>3</sup>

*Agent becoming purchaser.* A consignee may also by the terms of his agency be the agent of the consignor until the goods are sold, yet then become, as between himself and the consignor, the purchaser of the goods, and principal debtor therefor.<sup>4</sup>

*Value in invoice.* The fact that a value is stated in the invoice of merchandise accompanying its shipment, does not by itself absolutely indicate that the property was sold and not consigned, but may be designed as a guide and direction as to the amount or sum for which the merchandise might be sold by the consignee.<sup>5</sup>

*Word "consign."* So the word "consign" has been held not to imply a title to the goods in the manufacturer, when controlled in its common meaning by the other provisions of the contract as applied to the subject-matter.<sup>6</sup> But it is different where the other provisions of the contract do not so control it, but show that the word was used in its obvious and common meaning, implying title in the consignor.<sup>7</sup>

*Consignments to cover advances.* The rule upon the subject of consignments to cover advances is stated to be, that if there is a mere agreement to ship goods or produce to pay for advances, without transmission of the bill of lading or notice of the shipment, the property shipped would not belong to the consignee until actually received and possessed by him.<sup>8</sup> But if the agreement appropriates specific property to the payment of such advances, and such appropriation is evidenced and authenticated by a bill of lading, then the title to the property passes to the consignee by a delivery thereof to the carrier.<sup>9</sup>

1 Walker v. Butterick, 105 Mass. 237, 238. No title in debtor where case resembles shipment of goods to an agent to sell on commission: Alexander v. Tomlinson, 40 Ark. 216, 218, 219. Sale of agricultural



machines held not contemplated: *Williams Brothers v. Davis*, 47 Iowa, 363, 367. Agency created by agreement to "stock" wharf with coal and wood: *Audenried v. Betteley*, 8 Allen, 302, 307.

2 *Ex parte White*, re Nevill, Law R. 6 Ch. 397, 403; affirmed as *Towle v. White*, 21 Week. R. 465. *Del credere* commission: See, also, *Converseville Co. v. Chambersburg Co.* 14 Hun, 609, 610, 611.

3 In re Linforth, 4 Sawy. 370, 374. Sale of wagons shipped and not agency to sell them on commission: *Jordan v. Easter*, 2 Ill. App. 73.

4 *Nutter v. Wheeler*, 2 Low. 346, 348, 349. And see *Ex parte White*, Law R. 6 Ch. 397. But compare *Ayres v. Sleeper*, 7 Met. 45, 46.

5 *Pam v. Vilmar*, 54 How. Pr. 235.

6 *Schenck v. Saunders*, 13 Gray, 37. Instructions held not to define the word "consign": *Reissner v. Oxley*, 80 Ind. 580, 585.

7 *Dittman v. Norman*, 118 Mass. 319, 324.

8 *First Nat. Bank v. McAndrews*, 5 Mont. 325, 332.

9 *First Nat. Bank v. McAndrews*, 5 Mont. 325, 332. And see *Halliday v. Hamilton*, 11 Wall. 564; *Wetzel v. Power*, 5 Mont. 214, 225.

§ 26. Remedies in such transactions. — *Action for goods sold and delivered.* A count for goods sold and delivered is not supported by proof that the goods were consigned to the defendant for sale, and that he sold them and unreasonably refused or neglected, after demand, to account for the proceeds,<sup>1</sup> since such action, however inexcusable, cannot convert the consignment into a sale;<sup>2</sup> nor is an action for goods sold and delivered maintainable upon an arrangement whereby there is no transfer to a factor of the property in the goods, so that one of the essential elements of a sale is wanting.<sup>3</sup>

*Action against carrier.* But the consignee of mowing machines to be sold on commission, though not acquiring the title, yet has such a special property that he may maintain an action against a carrier for their detention in transit.<sup>4</sup>

*Evidence in replevin suit.* And in action of replevin brought to recover goods sent by the plaintiff to be purchased by the receiver or sold on account of the sender, as the former should elect, it has been held that where the former puts in evidence that he received the goods on consignment merely, the latter is properly allowed

to testify that when he received the letter of the former, he decided to purchase the goods.<sup>5</sup>

1 *Ayres v. Sleeper*, 7 Met. 45, 46.

2 *Ayres v. Sleeper*, 7 Met. 45, 46. Compare *Brown v. Holbrook*, 4 Gray, 102, 104; *Hull v. Richardson*, 4 Gray, 598, 599.

3 *Wadsworth v. Gay*, 118 Mass. 44, 53.

4 *Boston etc. R. R. Co. v. Warrior Mower Co.* 76 Me. 251, 259. And recover not only his own damages, but such as accrued to the company as general owners: *Boston etc. R. R. Co. v. Warrior Mower Co.* 76 Me. 251, 259.

5 *Yaeger Milling Co. v. Brown*, 128 Mass. 171, 173. Evidence governing finding of jury: *Chapman v. Kerr*, 80 Mo. 153. Inference of sale to consignee: *Holbrook v. Wight*, 24 Wend. 169; 35 Am. Dec. 605, n. 616.

§ 27. *Sale or payment.—Compensation for service.* When property or money is transferred or paid as a compensation for service, this does not constitute a sale of the money or property for a price in service.<sup>1</sup>

*Payment or purchase of note.* And the payment of a note by a third person does not constitute a contract of purchase thereof.<sup>2</sup>

*“Giving in payment” in Louisiana.* In Louisiana, a contract such as a giving in payment equally with a sale, transfers the property in full ownership to the purchaser, and differs from a sale mainly in making the delivery of the thing transferred essential to the completeness of the contract.<sup>3</sup>

1 See *Five Per Cent Cases*, 110 U. S. 471, 478.

2 *Binford v. Adams*, 3 N. E. Rep. (Ind.) 753.

3 *Herold v. Stockwell*, 32 La. An. 949, 952. And compare *Miller v. Schneider*, 19 La. An. 300, 301; *Bessan v. Moucheux*, 21 La. An. 617.

§ 28. *Further distinctions.—Agency, loan, etc.* The cases distinguish the contract of sale from one of agency,<sup>1</sup> loan,<sup>2</sup> trust,<sup>3</sup> and security.<sup>4</sup>

*Accord and satisfaction.* And a contract of sale differs from accord and satisfaction, because in the latter the thing is given for the purpose of quieting a claim, and not for a price.<sup>5</sup>

*Contract for manufacture.* In general, the reasoning of the cases which have arisen under the statute of frauds, is said to imply that where it is a part of the very contract itself that the articles are to be manufactured, and by particular persons or from specific material, or in a prescribed manner, according to the order and direction of the party for whom the articles are made, the contract is for the manufacture of the articles,<sup>6</sup> and not for their sale.<sup>7</sup>

1 See *Black v. Webb*, 20 Ohio, 304 ; 55 Am. Dec. 446, n. 459 ; *Depew v. Keyser*, 3 Duer, 335, 340 ; *Conable v. Lynch*, 45 Iowa, 84.

2 See *First Nat. Bank v. McAndrews*, 5 Mont. 325 ; *Home v. Walton*, 7 N. E. Rep. (Ill.) 100 ; *Johnson v. Ensign*, 4 Atl. Rep. (Pa.) 37.

3 See *Ruthrauff v. Hagenbach*, 58 Pa. St. 103 ; *Bourg v. Lopez*, 36 La. An. 439, 440.

4 *First Nat. Bank v. McAndrews*, 5 Mont. 325, 335 ; *Harold v. Stockwell*, 32 La. An. 949, 952. Arrangements between debtor and creditor : *Ochs v. Burger*, 6 Heisk. 483, 486 ; *Gray v. Millay*, 61 Me. 327.

5 *Bouvier Law Dict. tit. Sale* (15th ed.) 606.

6 *Cain v. Weston*, 26 Wis. 100, 103.

7 See *Hight v. Ripley*, 19 Me. 137 ; *Abbot v. Gilchrist*, 38 Me. 260, 261 ; *Edwards v. Railway Co.* 48 Me. 379, 380, 381 ; *Atwater v. Hough*, 29 Conn. 508, 513 ; *Gardner v. Joy*, 9 Met. 177, 179 ; *Lamb v. Crafts*, 12 Met. 353, 356.



## CHAPTER III.

### CONSENT.

- § 29. In general.
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- § 40. Construction of correspondence.
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§ 29. *In general.* — *Essential to contract.* The consent, or as it is generally termed, the mutual assent of the parties, is essential to a contract of sale;<sup>1</sup> for a contract implies the assent of two minds.<sup>2</sup>

*May be implied.* But this assent need not be express.<sup>3</sup> It may be implied from the language, conduct, or gestures of the parties.<sup>4</sup> Thus, the fall of the hammer at an auction sale will bind the bargain,<sup>5</sup> and a grumbling assent may be sufficient.<sup>6</sup> So the sending of goods ordered may consummate the sale.<sup>7</sup>

*Unqualified and identical acceptance of offer.* A mere proposal or offer constitutes no bargain of itself,<sup>8</sup> being no more than a treaty or negotiation for a sale;<sup>9</sup> but it must be accepted by the other party,<sup>10</sup> and the assent must be unconditional and unqualified,<sup>11</sup> and completely correspond with the terms of the offer.<sup>12</sup>

*Withdrawal of offer and giving of time.* While the offer remains unaccepted, it is optional with the proposer to withdraw it or not;<sup>13</sup> and that which is sometimes spoken of as a contract for the sale of property, but which is what is popularly termed a refusal of the property given by one of the parties, leaving it optional with the other party whether he will take the property within a certain time or not, would not be valid in law, for want of consideration, unless upon some other consideration, or under seal;<sup>14</sup> but when an unretracted offer giving time for acceptance, though without consideration, is once accepted, the contract is complete.<sup>15</sup>

*Variation from offer as counter-proposition.* Mutual assent of the parties, which is vital to the existence of a contract,<sup>16</sup> is as indispensable to the modification of a contract already made as it was to making it originally.<sup>17</sup> And a proposal to accept, or an acceptance of an offer, on terms varying from those proposed, amounts to a rejection of the offer, and a substitution in its place of a counter-proposition,<sup>18</sup> which cannot become a contract until assented to by the first proposer.<sup>19</sup> Nor can a party who has submitted a counter-proposition withdraw or abandon the same, without the assent of the other party, and then accept the original offer which he has once virtually rejected.<sup>20</sup> For an offer once rejected is at end;<sup>21</sup> but a mere inquiry may not amount to a counter-proposal so as to terminate the offer.<sup>22</sup>

*Contract by letter.* In creating a contract the negotiation may be conducted by letter, as is very common in mercantile transactions;<sup>23</sup> and ordinarily the contract is complete when the answer containing the acceptance<sup>24</sup> of a distinct proposition is dispatched by mail or otherwise, provided it be one with due diligence after the receipt of the letter containing the proposal,<sup>25</sup> and before any intimation is received that the offer is withdrawn.<sup>26</sup>

1 See *Gardner v. Lane*, 12 Allen, 39, 43; 2 Kent Com. 477; *Summers v. Mills*, 21 Tex. 77, 83, 87; *Utley v. Donaldson*, 94 U. S. 23, 47.

2 *Thurston v. Thornton*, 1 Cush. 89, 91. And see *Smith v. Gowdy*, 8 Allen, 566, 567.

3 See citations in next note.

4 See *Street v. Chapman*, 29 Ind. 142, 152; *Joyce v. Swann*, 17 Com. B. N. S. 84, 101; *Payne v. Cave*, 3 Term Rep. 148; 1 Langdell's Cases on Contracts, 1; *Gowing v. Knowles*, 118 Mass. 232, 233; *Hoadley v. McLaine*, 10 Bing. 482, 487.

5 *Payne v. Cave*, 3 Term Rep. 148; 1 Langdell's Cas. on Contracts, 1.

6 *Joyce v. Swann*, 17 Com. B. N. S. 84, 101. Loose conversation may not be enough to make a binding contract: *Thurston v. Thornton*, 1 Cush. 89, 93. And compare *Bruce v. Bishop*, 43 Vt. 161, 164.

7 See *Taylor v. Jones*, Law R. 1 C. P. D. 87, 90.

8 *Bruce v. Bishop*, 43 Vt. 161, 163. See § 8, on SALE OR PRELIMINARY NEGOTIATION.

9 See *Carr v. Duval*, 14 Peters, 77, 81.

10 See *Thurston v. Thornton*, 1 Cush. 89, 92; *Smith v. Gowdy*, 8 Allen, 566, 567; *Gowing v. Knowles*, 118 Mass. 232, 233. The contract becomes binding when a proposition is made on one side and accepted on the other. 2 Kent Com. 477.

11 See *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 82; *Duke v. Andrews*, 2 Ex. 290, 296; *Appleby v. Johnson*, Law R. 9 Com. B. 158.

12 *Summers v. Mills*, 21 Tex. 77, 87; *Potts v. Whitehead*, 23 N. J. Eq. 512, 514. See § 33.

13 See *Summers v. Mills*, 21 Tex. 77; *Hebb's Case*, Law R. 4 Eq. 9; 1 Langdell's Cases on Contracts, 1, 42; *Payne v. Cave*, 3 Term Rep. 143; also cases cited in next note.

14 *Faulkner v. Hibard*, 26 Vt. 452, 457. And see *Cooke v. Oxley*, 3 Term Rep. 653; 1 Langdell's Cases on Contracts, 2, 5, 61, 67, 68; *Routledge v. Grant*, 4 Bing. 653; *Dickinson v. Dodds*, Law R. 2 Ch. D. 463.

15 *Boston etc. R. R. v. Bartlett*, 3 Cush. 224; 1 Langdell's Cases on Contracts, 103. And see *Stevenson v. McLean*, Law R. 5 Q. B. D. 346; 29 Eng. Rep. 341, 345.

16 See preceding portion of section.

17 *Utley v. Donaldson*, 94 U. S. 23, 47.

18 See *Jenness v. Mount Hope Iron Co.* 53 Mo. 20, 23.

19 *Fox v. Turner*, 1 Ill. App. 153, 159.

20 *Fox v. Turner*, 1 Ill. App. 153, 159, and cases cited.

21 *Hyde v. Wrench*, 3 Beav. 334; 1 Langdell's Cas. on Contracts, 13.

22 *Stevenson v. McLean*, Law R. 5 Q. B. D. 346; 29 Eng. Rep. 341, 344.

23 2 Kent Com. 474. Contract by letter discussed: Note to *MacLay v. Harvey*, 42 Am. Rep. 40; note to *Philadelphia Whiting Co. v. Detroit White Lead Works*, 24 N. W. Rep. 385.

24 Acceptance must be direct and unconditional: See *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

25. See *Averill v. Hedge*, 12 Conn. 424; 1 Langdell's Cases on Contracts, 90, 98.

26 2 Kent Com. 477; *Abbott v. Shepard*, 48 N. H. 14, 16. And see *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

§ 30. *When lacking.*—*Misunderstanding on material matter.* Where there is a misunderstanding as to anything material, the requisite mutuality of assent as to such thing is wanting, so that the supposed contract does not exist,<sup>1</sup> and neither party is bound.<sup>2</sup> And so long as there is a dispute going on between the parties as to the terms of a sale, there is no meeting of minds.<sup>3</sup>

*Failure to fully agree on terms.* Thus there can be no contract of sale unless the parties have fully agreed on all the terms of the contract,<sup>4</sup> as where the letters relied on do not show that the parties ever agreed on the number of articles, the time or manner of delivery, or the other terms of the alleged bargain;<sup>5</sup> or where the parties differed concerning the length of credit to be given, and reached no conclusion in the matter.<sup>6</sup>

*Colorable sale.* And a mere colorable sale of personal property, made with the intention that the title should not be transferred in reality, but only in appearance, conveys no title whatever to the apparent purchaser.<sup>7</sup>

*Bantering conversation.* Where the testimony tended to show that an offer was intended and understood to be merely jocose, and not in earnest, it has been held that it should have been left to the jury<sup>8</sup> to find whether it was so intended and understood.<sup>9</sup>

1 *Utley v. Donaldson*, 94 U. S. 29, 47. It is no contract if there be an error or mistake of a fact, or in circumstances going to the essence of it: 2 Kent Com. 477.

2 *Utley v. Donaldson*, 94 U. S. 29, 47. In the view of the law in such cases, there has been only a negotiation resulting in a failure to agree: *Utley v. Donaldson*, 94 U. S. 29, 47. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly: *Utley v. Donaldson*, 94 U. S. 29, 47. See further under MISTAKE; *Lyman v. Robinson*, 14 Allen, 242, 252; *Clay v. Rickets*, 23 N. W. Rep. (Iowa) 755; *Butler v. Moses*, 43 Ohio St. 166, 171.

3 *Schenectady Stove Co. v. Holbrook*, 4 N. E. Rep. (N. Y.) 4.

4 See citations in succeeding notes.

5 *Oakman v. Rogers*, 120 Mass. 214, 215.

6 *Gowing v. Knowles*, 118 Mass. 222, 223.

7 *Cox v. Jackson*, 6 Allen, 108, 109. And see *Bradley v. Hale*, 8 Allen, 59, 60; *Dawson v. Wetherbee*, 16 Gray, 123, 124; *Billings v. Thomas*, 114 Mass. 570, 573. But compare *Dyer v. Homer*, 22 Pick. 253, 257.

8 See *Thurston v. Thornton*, 1 Cush. 89.

9 *Bruce v. Bishop*, 43 Vt. 161, 164.

§ 31. **Parties consenting.**—*Personality of contracting party important.* When a contract is made in which the personality of the contracting party is or may be of importance,<sup>1</sup> as a contract with a man to write a book, or paint a picture, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has reasons why he does not wish to deal with a particular party, or where there might be a set-off, no other person can interpose and adopt the contract;<sup>2</sup> and this principle has been applied so as to prevent the recovery of the price of goods supplied, without notice of any change in the business by the successor in business of the party from whom they were ordered, by a customer who had been in the habit of dealing with such party, with whom he had a running account.<sup>3</sup>

*Retaining goods bought from successor.* But one who buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is dealing with his debtor, but is informed before leaving the shop that another person has become the owner of the stock of goods there, and is selling them on his own account, and makes no objection but retains the goods, cannot afterwards resist an action for the price.<sup>4</sup>

*Unauthorized assumption as to buyer's position.* And if one party sells goods in fact to another, supposing that the sale is really to a third party through the second as his agent, and solely in reliance on the credit of such third party, the seller cannot recover therefor from the third party, who had purchased the goods from the



second party,<sup>5</sup> as the case is not one of mistaken identity,<sup>6</sup> but of unauthorized assumption concerning the capacity in which a person acted.<sup>7</sup>

*Several acceptors.* An offer to sell made in writing to several persons jointly, and signed by all but one of them, cannot be withdrawn by a communication to one of the signers, if signed by the others in ignorance of such withdrawal.<sup>8</sup>

1 See citations in next note.

2 *Boulton v. Jones*, 2 Ex. 564, 566; *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9, 11. And see *Mitchell v. Lapage*, Holt N. P. 253; also section on subject under MISTAKE.

3 *Boulton v. Jones*, 2 Ex. 564, 566.

4 *Mudge v. Oliver*, 1 Allen, 74.

5 *Stoddard v. Ham*, 129 Mass. 383; 37 Am. Rep. 369.

6 Compare *Hardman v. Booth*, 1 Hurl. & C. 803.

7 *Stoddard v. Ham*, 129 Mass. 383; 37 Am. Rep. 369.

8 *Burton v. Shotwell*, 13 Bush, 271. Nor can such signer affect the validity of the contract, or cancel his liability by erasing his name without the consent of the other acceptors: *Burton v. Shotwell*, 13 Bush, 271.

§ 32. *Offer to sell.—Notice to the trade.* A price list is a mere proposition, which may be withdrawn at pleasure, unless accepted on the terms offered before withdrawal.<sup>1</sup> And in construing the language of a letter, stating that the senders were "authorized to offer" goods at certain terms, and a telegraphic reply thereto, which together were claimed to constitute a contract of sale, the language used in the letter was deemed clearly a notice in the nature of an advertisement or business circular, to attract the attention of those in the same line of business to the fact that good bargains in a specified commodity could be obtained by applying to the senders,<sup>2</sup> and not an offer by which they were to be bound, if accepted, for any amount the persons to whom the letter was addressed might see fit to order.<sup>3</sup>

*Quotation or statement of price.* So a distinction has been made between an offer to sell at a price named,

such quantity of a commodity as the inquiring party might order, and a dispatch which was rather a quotation of the market price of a commodity, or perhaps a statement of the price at which the sender held his own supply thereof.<sup>4</sup>

*Advantage taken of ambiguity.* Where a proposition to sell goods is sent by a writing that by mistake is ambiguous, and the receiver of the goods, knowing of such ambiguity, but claiming an improbable meaning unreasonably favorable to himself, and not intended by the sender or thought of by him, orders, obtains, and uses the goods, without notice to the sender, or inquiry of him as to his intended meaning, such receiver of the goods is liable for their value, as if no proposition had been sent.<sup>5</sup>

1 Schenectady Stove Co. v. Holbrook, 4 N. E. Rep. (N. Y.) 4.

2 Moulton v. Kershaw, 59 Wis. 316; 48 Am. Rep. 516, 518, 519.

3 Moulton v. Kershaw, 59 Wis. 316; 48 Am. Rep. 516, 519. Citing Beaupre v. Pac. etc. Tel. Co. 21 Minn. 155; Kinghorne v. Montreal Tel. Co. 18 Up. Can. Q. B. 60. Distinguishing Keller v. Ybarru, 3 Cal. 147.

4 Beaupre v. Pac. etc. Tel. Co. 21 Minn. 155. Stated in note to Moulton v. Kershaw, 48 Am. Rep. 519. And a county dispatch was held not an acceptance of an offer, but as itself merely an offer or order for goods: See Moulton v. Kershaw, 59 Wis. 316; 48 Am. Rep. 519.

5 Butler v. Moses, 43 Ohio St. 166, 169, 170.

§ 33. **Correspondence of acceptance with offer.** — *Scope of requirement.* The parties to a contract of sale must assent to the same thing in the same sense.<sup>1</sup> The assent must comprehend the whole of the proposition,<sup>2</sup> and the acceptance must be exactly equal to the extent and provisions of the offer, and must not qualify them by any new matter.<sup>3</sup> For an acceptance to be good must conclude an agreement or contract between the parties, and to do this it must in every respect meet and correspond with the offer.<sup>4</sup>

*Variation from offer.* If the answer, either in words or effect, departs from the proposition, or varies the

terms of the offer, or substitutes for the contract tendered are more satisfactory to the responding party, there is no assent and no contract.<sup>5</sup> Thus, there is not an acceptance of an offer so as to conclude a contract between the parties, if less goods are sent than are ordered;<sup>6</sup> or where there is an addition of another term not yet provided for;<sup>7</sup> or where a condition is inserted in the acceptance,<sup>8</sup> such as the payment of a commission.<sup>9</sup> But the acceptance must be direct, unconditional, and unqualified,<sup>10</sup> and must not, after agreeing to take the property offered for sale, require that provision be made for the removal of an attachment thereon.<sup>11</sup> So under the principle that an acceptance must be in the words of an offer, or must be entirely accordant with the terms and conditions thereof, to bind a party who makes the proposition,<sup>12</sup> there is a variance from an offer to sell malt "delivered" on a boat, by an acceptance agreeing to take the malt "deliverable" on the boat;<sup>13</sup> and an offer by letter to buy a mare if warranted "sound and quiet in harness," is not met by a reply stating that the animal is warranted "sound and quiet in double harness";<sup>14</sup> and an offer of "good barley" is not sufficiently accepted where the reply, in assenting to the proposal, expresses an expectation that the sellers will give "fine barley and full weight."<sup>15</sup>

*Place to which answer to be sent.* Where the place to which the answer is to be sent, as indicated by the mode of conveyance mentioned, constitutes an essential part of an offer to buy goods, an acceptance communicated at a different place is not binding upon the proposers.<sup>16</sup>

*Immaterial addition.* But an immaterial addition to an acceptance does not prevent the taking effect of the contract,<sup>17</sup> as where a hope is expressed that the buyer of hay will pay a greater price for it when hauled;<sup>18</sup> or

that possession of premises will be given by a certain day;<sup>19</sup> or where arrangements are suggested for the drawing up of a more formal contract.<sup>20</sup>

1 *Summers v. Mills*, 21 Tex. 77, 86, 87. And see 1 *Parsons on Contracts*, 475; *Hazard v. N. E. Marine Ins. Co.* 1 Sum. 218, 225; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 81, 84; *Butler v. Moses*, 43 Ohio St. 166, 171.

2 See citations in next note.

3 1 *Parsons on Contracts*, 476; *Summers v. Mills*, 21 Tex. 77, 87; *Hutcheson v. Blakeman*, 3 Met. 80, 81.

4 *Potts v. Whitehead*, 23 N. J. Eq. 512, 514. Neither falling within nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they stand; *Potts v. Whitehead*, 23 N. J. Eq. 512, 514; quoted, *Fox v. Turner*, 1 Ill. App. 153, 153.

5 *Summers v. Mills*, 21 Tex. 77, 87. And see 1 *Parsons on Contracts*, 477; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 81; *Wynne's Case*, Law R. 8 Ch. Cas. 1002.

6 *Bruce v. Pearson*, 3 Johns. 534.

7 *Potts v. Whitehead*, 23 N. J. Eq. 512, 514. And see *Honeyman v. Marryatt*, 6 H. L. Cas. 112; *Holland v. Eyre*, 2 Sim. & St. 194, 195; *Duke v. Andrews*, 2 Ex. 290, 296; *Chaplin v. Clarke*, 4 Ex. 403, 409; *Beck's Case*, Law R. 9 Ch. Cas. 322.

8 See *Wontner v. Shairp*, 4 Com. B. 404, 441; *Crossley v. Muncock*, Law. R. 18 Eq. 180, 181.

9 *Harlow v. Curtis*, 120 Mass. 320, 322. Conditions of small importance may prevent consummation of contract by correspondence: *Merriam v. Lapsley*, 2 McCrary, 606, 607. And see *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35, 38.

10 *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 82. And see *Eliason v. Henshaw*, 4 Wheat. 225; 1 *Langdell's Cases on Contracts*, 70, 71; *Taylor v. Merchants' Fire Ins. Co.* 9 How. 390; 1 *Langdell's Cases on Contracts*, 106, 109; *Baker v. Holt*, 56 Wis. 100, 103; *Clay v. Ricketts*, 23 N. W. Rep. (Iowa) 755; *Corcoran v. White*, 7 N. E. Rep. (Ill.) 525. Compare *Stanley v. Dowdeswell*, Law R. 10 Com. P. 102.

11 *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 83.

12 See preceding portions of section.

13 *Myers v. Smith*, 48 Barb. 614, 624.

14 *Jordan v. Norton*, 4 Mees. W. 155, 161.

15 *Hutchison v. Bowker*, 5 Mees. & W. 535, 540, 541. Discrepancy between letters on the one side mentioning "first quality Jefferson County barley," and then on the other speaking of "two-rowed barley"; *Vassar v. Camp*, 11 N. Y. 441; 1 *Langdell's Cases on Contracts*, 110, 113.

16 *Eliason v. Henshaw*, 4 Wheat. 225; 1 *Langdell's Cases on Contracts*, 70, 72.

17 See citations in succeeding notes. And compare *Proprs. v. Arduin*, Law R. 5 Eng. & Ir. App. 64.

18 *Phillips v. Moore*, 71 Me. 78, 79.

19 See *Clive v. Beaumont*, 1 De Gex & S. 397, 403.

20 *Branson v. Stannard*, 41 L. T. N. S. 434, 435. And see *Gibbons v. Board etc.* 11 Beav. 1; *Bonnewell v. Jenkins*, 38 L. T. N. S. 581, 582.

§ 34. **Applications of requirement.**—*Illustrations of want of correspondence, etc.* The doctrine that the acceptance must be unconditional and unqualified so as to correspond with the offer, has been applied to allotments of shares,<sup>1</sup> and to goods sent in less quantity and at shorter credit than ordered;<sup>2</sup> to an acceptance qualified both as to the quality of goods and as to the time of their delivery,<sup>3</sup> or which introduces a new term by requiring an article to be of a particular quality;<sup>4</sup> to an answer involving a wide departure from the terms of a letter making a proposition,<sup>5</sup> and to a letter modifying and re-submitting the original proposition;<sup>6</sup> to a case where one party offered goods delivered at the city where he resided, at a specified price per bushel, and the other sent the goods, stating that he would expect the highest market price;<sup>7</sup> and to a suggested sale of a partnership interest, where there is not an entire agreement between the proposal and acceptance in regard to the subject-matter and the extent of the interest to be transferred.<sup>8</sup>

*When no agreement.* So there is deemed to be no agreement if there are any essential matters affecting the rights of the parties left open for further consideration;<sup>9</sup> or where a proviso in the offer, that the security be satisfactory, is not complied with.<sup>10</sup> And in reply to a letter offering to sell two hundred boxes of cheese at a given price, and to deliver them at a place designated, "one hundred now, and one hundred about the middle of October next," a letter accepting the offer as to amount and price, and place of delivery, but not as to time of delivery, is not an unconditional acceptance of the offer, so as to effect a contract.<sup>11</sup>

*Charging goods, etc.* Where in reply to a proposition, asking parties to guarantee the payment of a bill of lumber to be sold to a third party, the firm addressed answers that the lumber, when sold, might be charged to it,<sup>12</sup>

this is not an acceptance but a counter-proposition,<sup>13</sup> and no contract is consummated if there is no express assent thereto, and if the goods are charged to the third party instead of to the firm addressed.<sup>14</sup>

1 Oriental etc. Co. v. Briggs, 4 De Gex, F. & J. 191, 196.

2 Bruce v. Pearson, 3 Johns. 534, 535.

3 Carter v. Bingham, 32 Up. Can. Q. B. 615, 617, 619. Unmeaning acceptance: Kinghorne v. Montreal Tl. Co. 18 Up. Can. Q. B. 60, 61.

4 McIntosh v. Brill, 20 Up. Can. C. P. 426. But the words, "send directions about shipping," have been held not to qualify a previous unconditional acceptance: Marshall v. Jamieson, 42 Up. Can. Q. B. 115, 122, 124. "Order cars" similarly construed: Murphy v. Thompson, 23 Up. Can. C. P. 233, 237. "At owner's risk of delay," as preventing binding contract: Willing v. Caine, 33 Up. Can. Q. B. 46.

5 Snow v. Miles, 3 Cliff. 603, 613.

6 Solomon v. Webster, 4 Cal. 353, 361.

7 Plant Seed Co. v. Hall, 14 Kan. 553, 555.

8 Eggleston v. Wagner, 43 Mich. 610; Wagner v. Eggleston, 49 Mich. 218.

9 Sourwine v. Sourwine, 17 Hun, 432.

10 McGrath v. Brown, 66 Barb. 481.

11 Johnson v. Stephenson, 26 Mich. 63.

12 Compare Usberoth v. Riegel, 71 Pa. St. 280, 281.

13 See § 29, ON CONSENT IN GENERAL.

14 Smith v. Wetherell, 4 Ill. App. 655, 659.

§ 35. *Time for acceptance.—Offer giving.* An offer granting time for acceptance, while in force and unrevoked, is a continuing offer during the time limited for acceptance;<sup>1</sup> but as soon as it is accepted it ceases to be an offer merely, and through the assent of the parties ripens into a binding and complete contract, since the acceptance by the one party constitutes a sufficient legal consideration for the engagement on the part of the other.<sup>2</sup>

*Reasonable time where none fixed.* An offer to make a sale which fixes no time within which it shall be accepted, must be accepted within a reasonable time.<sup>3</sup> Thus, if a proposition is made at a personal interview, and the other party is told that he need not give a decided answer then, but might do so thereafter, he

must notify his acceptance within a reasonable time.<sup>4</sup> So, a proposition or offer made by letter which is not replied to within a reasonable time, cannot be considered as a contract.<sup>5</sup>

*Retention of chattel.* If a chattel be delivered by one person to another on trial with a view to a sale, and the latter retains the chattel for an unreasonable time, the former may regard the transaction as a sale and recover the price.<sup>6</sup> So on an exchange of horses with the privilege to one of the parties to return, within a given time, the horse received by him, the contract becomes absolute if such party fails within the time to return the horse so received.<sup>7</sup> And it is a general principle applicable to all personal property, that where goods are delivered on sale or return, they must be returned in a reasonable time, or the sale becomes absolute.<sup>8</sup>

*Mailing acceptance.* To constitute a valid contract by letter, if no time for acceptance of the offer is fixed, it must be affirmatively shown that the acceptance was mailed within a reasonable time and before any intimation of withdrawal was received.<sup>9</sup> And a milliner is under no obligation to regard a contract as closed, where he, by letter sent through the mail, offered to employ a party, stating terms, and asking for a reply by next mail, and the party addressed, on the next day after receiving the letter, gave a postal card, accepting the offer, to a boy to be mailed, but he neglected to mail it until the third day after it was intrusted to him.<sup>10</sup> So, where in a letter offering to sell land it was said: "This is my offer, if you want it now; I would not agree to keep the offer good a great while," it was questioned whether a letter of acceptance was in time, if mailed nine or ten days after the receipt of the offer.<sup>11</sup>

*Notice of retraction of offer for delay.* But though an offer to be binding upon the party making it must be

accepted within a reasonable time,<sup>12</sup> yet it has been held that if the party to whom it is made makes known his acceptance of it to the party making it, within any period which he could fairly have supposed to be reasonable, good faith requires the maker, if he intends to retract on account of the delay, to make known that intention promptly.<sup>13</sup>

1 Boston etc. R. R. v. Bartlett, 3 Cush. 224; 1 Langdell's Cases on Contracts, 103, 105.

2 Boston etc. R. R. v. Bartlett, 3 Cush. 224; 1 Langdell's Cases on Contracts, 103, 105. It is precisely as if the parties had met at the time of the acceptance, and the offer had been then made and accepted, and the bargain completed at once: 1 Langdell's Cases on Contracts, 103, 105.

3 See Craig v. Harper, 3 Cush. 158, 160; Averill v. Hedge, 12 Conn. 424; 1 Langdell's Cases on Contracts, 90. So of rewards: Loring v. City of Boston, 7 Met. 409, 412, 413; 1 Langdell's Cases on Contracts, 99. Four months held not a reasonable time: Chicago etc. N. N. Co. v. Dane, 43 N. Y. 240, 243.

4 See Beckwith v. Cheever, 21 N. H. 41, 43, 44.

5 See Martin v. Black, 21 Ala. 721, 729.

6 Washington v. Johnson, 7 Humph. 468, 469.

7 Johnson v. McLane, 7 Blackf. 501, 504.

8 Washington v. Johnson, 7 Humph. 468, 469. What is a reasonable or unreasonable time in such cases is a question of fact for the jury, and must depend in a great degree upon the nature of the property: Washington v. Johnson, 7 Humph. 468, 469.

9 Ferrier v. Storer, 63 Iowa, 484; 50 Am. Rep. 752, 755, 756.

10 Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35. Stipulation for answer by return mail: See argument in Dunlop v. Higgins, 1 H. L. Cas. 381, 387; Taylor v. Rennie, 35 Barb. 272, 276.

11 Baker v. Holt, 56 Wis. 100, 104.

12 Phillips v. Moore, 71 Me. 78, 80. And see Peru v. Turner, 10 Me. 185; also preceding portion of section.

13 Phillips v. Moore, 71 Me. 78, 80.

§ 36. Limiting time for acceptance.—*Illustration.* A paper signed by a party, by which he agrees that another, in consideration of one dollar paid, shall have for thirty days the refusal of certain land therein designated, and that he will convey the same in consideration of a specified sum per acre, a certain amount to be paid on the execution of the deed, and the balance in a mortgage on the land, with interest at a designated



rate, no time being named for delivering the deed, nor any time for which the mortgage shall run, is not a contract, but only a refusal,<sup>1</sup> or offer of the lands at a certain price,<sup>2</sup> and could not be converted into a contract unless accepted within the thirty days.<sup>3</sup>

*General rule.* And in general, when an offer is made for a time limited in the offer itself, no acceptance afterwards<sup>4</sup> will make it binding.<sup>5</sup>

1 See § 29, on CONSENT IN GENERAL.

2 Potts v. Whitehead, 20 N. J. Eq. 55, 57.

3 Potts v. Whitehead, 20 N. J. Eq. 55, 57.

4 See § 35, on TIME FOR ACCEPTANCE.

5 Potts v. Whitehead, 20 N. J. Eq. 55, 57. For any offer without consideration may be withdrawn at any time before acceptance: Potts v. Whitehead, 20 N. J. Eq. 55, 57. And an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time, which cannot be extended without the consent of the person making the offer: Potts v. Whitehead, 20 N. J. Eq. 55, 57.

§ 37. *Modes of acceptance.* — *Sending letter.* Where the offer is by letter, the usual mode of acceptance is by the sending of a letter announcing a consent to accept.<sup>1</sup>

*Through messenger.* And where the offer is made by a messenger, a determination to accept, returned through him or sent by another, would seem to be all the law requires, if the contract may be consummated without writing.<sup>2</sup>

*Other modes.* But there are other modes which are equally conclusive upon the parties;<sup>3</sup> even keeping silence under certain circumstances is an assent to a proposition;<sup>4</sup> and anything that shall amount to a manifestation of a formed determination to accept, communicated or put in a proper way to be communicated to the party making the offer, would doubtless complete the contract.<sup>5</sup> Thus, it is said that the overt act may be as various as the form and nature of contracts;<sup>6</sup> and it may be by fall of the hammer, by words spoken, by letter, by telegraph.<sup>7</sup> If one holds his property out for sale, naming the terms, and another accepts the terms, the

contract is complete; or if one bids at an auction, and the hammer falls, the contract is complete; or if one advertises, offering a reward for something to be done, as soon as the thing is done the contract is complete, and the reward is due.<sup>8</sup>

*Compliance with proposition.* And in general, compliance with a proposition, especially where no notice of acceptance is required, is the most significant evidence of its acceptance.<sup>9</sup>

*Uncommunicated intention.* But an intention to accept a proposition is not an acceptance, unless communicated to the party making it.<sup>10</sup>

*Addressing letter.* An acceptance of an offer in writing to convey land within a certain time, in consideration of a price named, may be communicated by mail, but it must be actually placed in the postoffice, directed to the proper place;<sup>11</sup> and if directed to a place where the party to be bound by it only sometimes resorts, it must be proved to have been received.<sup>12</sup>

1 Mactier v. Frith, 6 Wend. 103; 21 Am. Dec. 262, 272; Langdell's Cases on Contracts, 77. And see Hallock v. Ins. Co. 2 Dutch. 268, 281, 282; affirmed, 3 Dutch. 645; 72 Am. Dec. 379.

2 Trevor v. Wood, 36 N. J. 307, 310; quoting Mactier v. Frith, 21 Am. Dec. 262, 272; 1 Langdell's Cases on Contracts, 77.

3 See citations in last note. Contracts by telegraph: See § 43.

4 See 1 Parsons on Contracts, 476. Implied agreement to pay value of wares taken up from a tradesman's counter: 2 Blackst. Com. 443; Hoadly v. McLaine, 10 Bing. 482, 487.

5 Mactier v. Frith, 6 Wend. 103; 21 Am. Dec. 262, 272; 1 Langdell's Cases on Contracts, 77; as quoted, Trevor v. Wood, 36 N. Y. 307, 310. And see Abbott v. Shephard, 4 N. H. 14, 17.

6 Hallock v. Ins. Co. 2 Dutch. 268, 281; affirmed, 3 Dutch. 645; 72 Am. Dec. 379.

7 Hallock v. Ins. Co. 2 Dutch. 268, 281; quoted, Ferrier v. Stover, 63 Iowa, 484, 488; 50 Am. Rep. 752, 754.

8 Crook v. Cowan, 64 N. C. 743, 746.

9 Patton v. Hassinger, 69 Pa. St. 311, 314. See § 38, on ACCEPTANCE BY ACTS.

10 Jenness v. Iron Co. 53 Me. 20, 23. And see McDonald v. Boeing, 43 Mich. 394, 396; Shupe v. Galbraith, 32 Pa. St. 10, 11; McCulloch v. Eagle Ins. Co. 1 Pick. 278; 1 Landgell's Cases on Contracts, 72.

11 Potts v. Whitehead, 20 N. J. Eq. 55, 59.

12 Potts v. Whitehead, 20 N. J. Eq. 55, 59, 60.

§ 38. *Acceptance by acts. — Sending goods as proposed.*

A mere mental assent to the terms stated in a proposed contract would not be binding;<sup>1</sup> but acting upon those terms by sending goods in the quantities and at the prices mentioned in it, amounts to sufficient to show the adoption of the writing previously altered and sent, and to constitute a valid contract.<sup>2</sup>

*Acts of acquiescence, etc.* So where a contract between a railroad company and a telegraph company was reduced to writing and signed by the telegraph company, and a copy thereof, sent to the railway company, was accepted by letter of its agent, except as to one matter which was acceded to by the former company, and under this arrangement the telegraph company made large expenditures, and each of the companies for a long time acted upon the terms of the contract, it was held that by the acts of acquiescence, adoption, and recognition by the railroad company of the terms of the contract, it was binding on the latter,<sup>3</sup> although such company did not formally execute the same.<sup>4</sup>

*Written proposition and prior verbal offers.* Nor can a party accept a part only of a written proposition for a contract, and at the same time rely on a portion of the antecedent verbal offers;<sup>5</sup> and if such party acts under a written proposal, and avails himself of all the rights and privileges it confers, this will show an acceptance.<sup>6</sup>

*Compliance with order for goods.* If one send by mail an absolute and specific order for certain goods to a merchant who sells such goods, the latter need not reply by mail engaging to send them, but the contract will be complete upon his at once complying with the order.<sup>7</sup>

1 Brogden v. Metrop. Ry. Co. 2 App. Cas. 666, 688, 691. But any appropriate act of assent of a binding character is as good as a formal letter of acceptance: Lungstrass v. German Ins. Co. 48 Mo. 201, 205.

2 Brogden v. Metrop. Ry. Co. 2 App. Cas. 666.

3 West. Union Tel. Co. v. Chicago etc. R. R. Co. 86 Ill. 446.

4 *West. Union Tel. Co. v. Chicago etc. R. R. Co.* 86 Ill. 246, 251, 252. Facts held sufficient to show an acquiescence by buyers in a change of the contract of sale as to time of delivery, and to bind them to accept the remainder of the goods according to it: *Tilt v. La Salle Manuf. Co.* 5 Daly, 19.

5 *Pickrel v. Rose*, 87 Ill. 263, 263.

6 *Pickrel v. Rose*, 87 Ill. 263, 263.

7 *Crook v. Cowan*, 64 N. C. 743, 747, 748.

§ 39. *Contract by letter.—Mailing acceptance binds bargain.* Where a proposition of sale is made by letter through the mail, the mailing of the acceptance, according to the weight of authority, closes the contract,<sup>1</sup> and the party making the proposition cannot retract after the acceptance by his correspondent has been deposited in the postoffice.<sup>2</sup> Nor can the party accepting retract his acceptance after posting his letter.<sup>3</sup>

*Ground of doctrine.* The principle said to be established as governing the subject is that in order to constitute a binding acceptance, it is only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act;<sup>4</sup> and that the sending of a letter announcing a consent to the proposal is a sufficient manifestation, and consummates the contract from the time it is sent.<sup>5</sup>

*Delay or failure in receipt of acceptance.* And where the offer is made by letter, the contract is complete, if the acceptance is mailed within a reasonable time,<sup>6</sup> although the acceptance may be delayed, or may not be received at all, owing to the fault of the post.<sup>7</sup>

*Delay in delivery of offer or acceptance.* If the delivery of the letter containing the offer is delayed by the fault of the sender, the period for posting acceptance is extended until the arrival of the proposal;<sup>8</sup> and this was held where the letter making an offer to sell goods was misdirected by the sender's fault, and was consequently delayed two days in transmission, and before receipt of the acceptance the sender of the offer sold the

goods to a third person.<sup>9</sup> But if undue delay in the delivery of the letter of acceptance is caused by the fault of the accepting party, there is no contract;<sup>10</sup> so that where the accepting party put his letter into the hands of an agent, the contract is not concluded so long as the letter remains in the agent's hands, even if the agent is the postmaster.<sup>11</sup>

*Intervention of friend or agent.* A proposition to sell, contained in a letter sent by mail to the writer's agent or friend, with request to communicate it, may, after communication to the person for whom it was intended, be accepted by a written reply from the latter, addressed directly to the maker of the proposition;<sup>12</sup> and in such case sending the reply to the postoffice through the same agent or friend, first permitting him to read it, and telling him orally that the proposition is accepted, will not prevent the contract from being one made by letter;<sup>13</sup> and the contract will be closed, not from the time of leaving the reply to be carried to the postoffice,<sup>14</sup> but from the time of its delivery into the postoffice.<sup>15</sup>

1 See cases next cited.

2 *Adams v. Lindsell*, 1 Barn. & Ald. 681; 1 Langdell's Cases on Contract, 4; *Dunlop v. Higgins*, 1 H. L. Cas. 331; 1 Langdell's Cases on Contracts, 21; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 23, 29; *Mac-tier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; 1 Langdell's Cases on Contracts, 77; *Vassar v. Camp*, 11 N. Y. 441; 1 Langdell's Cases on Contracts, 110; *Byrne v. Van Tienhoven*, Law R. 5 C. P. D. 344; 30 Eng. Rep. 133. And see *Taylor v. Merchants' Fire Ins. Co.* 9 How. 390; 1 Langdell's Cases on Contracts, 106; *Harris' Case*, Law R. 7 Ch. App. 537; 1 Langdell's Cases on Contracts, 54; 3 Eng. Rep. 529; *Abbott v. Shepard*, 48 N. H. 14, 16; *Ferrier v. Stover*, 63 Iowa, 484; 50 Am. Rep. 752, 754; *Household Fire Ins. Co. v. Grant*, Law R. 4 Ex. D. 210; 31 Eng. Rep. 466. And compare *Lewis v. Browning*, 130 Mass. 173, 175; *Haas v. Myers*, 111 Ill. 421; 53 Am. Rep. 634, 635. But see *contra*, *McCulloch v. Eagle Ins. Co.* 1 Pick. 278; 1 Langdell's Cases on Contract, 72; 2 Langdell's Cases on Contracts, 993, 994; 7 Am. Law Rev. 433. Consult further, 2 Kent Com. (12th ed.) 652; note to *Maclay v. Harvey*, 32 Am. Rep. 40.

3 See cases cited in last note. But compare *Countess of Dunmore v. Alexander*, 9 Shaw & D. 190; 1 Langdell's Cases on Contracts, 121. So of other contracts besides those of sale; *Coml. Ins. Co. v. Hallock*, 2 Dutch. 268; 3 Dutch. 645; 72 Am. Dec. 379, n. 380.

4 *Vassar v. Camp*, 11 N. Y. 441; 1 Langdell's Cases on Contracts, 110, 116, 117. And see *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; 1 Langdell's Cases on Contracts, 77.

5 *Trevor v. Wood*, 36 N. Y. 307, 309; *Vassar v. Camp*, 11 N. Y. 441; 1 Langdell's Cases on Contracts, 110, 116, 117. And see *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; 1 Langdell's Cases on Contracts, 77. Putting in the mail the answer by letter containing the acceptance, and thus placing it beyond the control of the party, is valid as a constructive notice of acceptance: 2 Kent Com. 477.

6 See § 35, on TIME FOR ACCEPTANCE.

7 See *Household Fire Ins. Co. v. Grant*, Law R. 4 Ex. D. 216; 31 Eng. Rep. 466; note to *Maclay v. Harvey* (90 Ill. 525); 32 Am. Rep. 40; *Dunlop v. Higgins*, 1 H. L. Cas. 381; 1 Langdell's Cases on Contracts, 21, 30; and other cases cited in first paragraph of section. Compare *Howard v. Daly*, 61 N. Y. 362, 365, 366.

8 *Adams v. Lindsell*, 1 Barn. & Ald. 681; 1 Langdell's Cases on Contracts, 4.

9 *Adams v. Lindsell*, 1 Barn. & Ald. 681; 1 Langdell's Cases on Contracts, 4. See note to *Maclay v. Harvey* (90 Ill. 525); 32 Am. Rep. 50, 51.

10 See citations in next note.

11 *Thayer v. Middlesex etc. Ins. Co.* 10 Pick. 326. As stated in note to *Maclay v. Harvey* (90 Ill. 525); 32 Am. Rep. 51.

12 *Bryant v. Boozer*, 55 Ga. 438.

13 *Bryant v. Boozer*, 55 Ga. 438, 448.

14 Compare *Thayer v. Middlesex etc. Ins. Co.* 10 Pick. 326.

15 *Bryant v. Boozer*, 55 Ga. 438, 448.

§ 40. **Construction of correspondence.**— *Contract arising from correspondence.* A contract need not be embraced in a single writing, but may be contained in letters constituting a correspondence between the parties.<sup>1</sup> Thus, it is a very common thing to buy and sell by letter.<sup>2</sup> In such cases the correspondence contains the contract, and it is for the court to construe the contract as it is extracted from the correspondence.<sup>3</sup>

*Assent to latest proposition.* But it is an undoubted rule of law that before an agreement can be gathered from a correspondence, it must appear by the correspondence that what has been proposed on the one side has been definitely agreed to upon the other, so that a clear and complete contract can be derived from the letters;<sup>4</sup> and applying this rule, a contract of sale cannot be considered as made until the latest proposition

on the part of the one is assented to by the other of the parties.<sup>5</sup>

*Distinct proposition and unqualified acceptance.* So to constitute a contract by correspondence one letter must contain a distinct proposition, and the answer must be an unqualified acceptance.<sup>6</sup> And if the answer mailed in response to a letter, merely offering to sell land, imposes conditions concerning the execution and forwarding of the deed, and the place of payment of the price, it does not amount to an unqualified acceptance so as to preclude the withdrawal of the offer.<sup>7</sup> Nor will a letter, and a telegram sent in reply thereto, constitute a contract, where the former is construed to be in the nature rather of an advertisement or circular suggesting good bargains, than an offer which might be accepted for any amount of goods the persons addressed might see fit to order.<sup>8</sup>

*Ambiguous document or letter.* Where both parties have acted upon a certain construction of an ambiguous document or letter, that construction, if in itself admissible, will be admitted by the court.<sup>9</sup>

*Meaning of written offer to sell.* And in ascertaining the meaning of a written offer to sell, all its parts and words should be examined in the light of the circumstances, and if possible, effect given to each.<sup>10</sup>

*Evidence to show sale.* In an action for the price of a horse alleged to have been sold by plaintiff to defendant, where the former, admitting that he had sent to the latter a letter containing an offer to sell him the horse for two hundred dollars, offered in evidence a letter, afterwards received from the defendant and signed by him, of the tenor following: "I might purchase your horse at two hundred dollars, the price you asked. I would like to get it at once, if it will do me, which I am quite certain it will. Please reply at once," it was held that the two

letters do not show a complete written contract for the sale of the horse ;<sup>11</sup> and that the one offered was competent evidence, in connection with parol evidence offered to show the sale charged.<sup>12</sup>

1 Thames Loan etc. Co. v. Beville, 100 Ind. 309, 314.

2 Cheney v. East Transp. Line, 59 Md. 557, 565.

3 Cheney v. East Transp. Line, 59 Md. 557, 565. Citing Eliason v. Henshaw, 4 Wheat. 225 ; 1 Langdell's Cases on Contracts, 70 ; Carr v. Duval, 14 Peters, 77 ; Bonnewell v. Jenkins, Law R. 8 Ch. D. 70 ; Propr's etc. v. Arduin, Law R. 5 Eng. & Ir. App. 64 ; Turner v. Yates, 16 How. 23 ; Watts v. Ainsworth, 1 Hurl. & C. 83.

4 Darlington Iron Co. v. Foote, 16 Fed. Rep. 646, 649.

5 Darlington Iron Co. v. Foote, 16 Fed. Rep. 646, 649.

6 Baxter v. Bishop, 65 Iowa, 582, 583. And see 1 Parsons on Contracts, 485 ; Vassar v. Camp, 11 N. Y. 441, 445 ; 1 Langdell's Cases on Contracts, 110, 113 ; § 33, on CORRESPONDENCE OF ACCEPTANCE, etc.

7 Baker v. Holt, 56 Wis. 100, 103. Following Northwestern Iron Co. v. Meade, 21 Wis. 474. Distinguishing Matteson v. Scofield, 27 Wis. 671.

8 Moulton v. Kershaw, 59 Wis. 316 ; 43 Am. Rep. 516, n. 519.

9 Foster v. Goldschmidt, 21 Fed. Rep. 70, 74.

10 Butler v. Moses, 43 Ohio St. 166. When such writing may have different meanings, and the receiver thereof, on inquiry of a third person, is given the true intent and meaning of the sender thereof, but acts thereon without further inquiry, and then seeks to hold the sender upon the writing, such receiver is bound by the true intent and meaning of the sender. Butler v. Moses, 43 Ohio St. 166.

11 Stagg v. Compton, 81 Ind. 171, 175.

12 Stagg v. Compton, 81 Ind. 171, 176.

§ 41. Preliminary negotiations or final agreement.—*In contract by correspondence.* A valid contract may doubtless be made by correspondence;<sup>1</sup> but care should always be taken not to construe as an agreement, letters which the parties intended only as a preliminary negotiation.<sup>2</sup>

*Test question.* The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they were to be bound ?<sup>3</sup>

*Determining circumstance.* And the circumstance that the parties do intend a subsequent agreement to be



made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.<sup>4</sup>

*Governing principle.* The principle governing cases of this character is said to be that if there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at.<sup>5</sup> But if the agreement is made subject to certain conditions, then specified or to be specified by or for the party making it, then there is no final agreement such as the court will enforce until those conditions are accepted.<sup>6</sup>

*Written contract to be prepared.* The mere fact that a written contract was to be subsequently prepared, does not show that a final agreement between the parties was not made, but it tends to show it.<sup>7</sup>

*Contract not specifically enforceable.* A contract, any material part of which remains to be settled by negotiation between the parties, as where there is no designation of the time of payment of the great bulk of the consideration for a conveyance of land, will not be enforced in equity on a bill for specific performance.<sup>8</sup> So there is a mere proposal of terms, and not a contract capable of enforcement by an accepted offer to sell land where there is uncertainty as to the clauses to be inserted in the contract, and as to the length of title to be shown.<sup>9</sup>

*Offer to purchase.* Where a party wrote to the manager of a bank, who was verbally authorized to sell certain property belonging thereto, "I hereby agree to purchase" specified property from the bank, and made a payment on account of the purchase money, but this memorandum was not submitted to the managing officers of the bank, nor signed by any one acting on their behalf, and the solicitor for the bank refused that it

should be put into such a shape as to bind the bank, it was held that the memorandum amounted to an offer to purchase only.<sup>10</sup>

*Acceptance of tender not sufficient, etc.* And the acceptance of a tender to supply a work-house with meat, does not form a binding contract, where the advertisement stated that all contractors would have to sign a written contract after acceptance of the tender.<sup>11</sup>

1 See *Thames Loan etc. Co. v. Beville*, 100 Ind. 309, 314.

2 *Lyman v. Robinson*, 14 Allen, 244, 252; quoted *Moulton v. Kershaw*, 59 Wis. 316, 321; 48 Am. Rep. 516, 518. See also *Gates v. Nelles*, 29 N. W. Rep. (Mich.) 73.

3 *Lyman v. Robinson*, 14 Allen, 242, 254.

4 *Ridgway v. Wharton*, 6 H. L. Cas. 268. An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement: *Ridgway v. Wharton*, 6 H. L. Cas. 268. For an agreement to enter into an agreement upon terms to be afterwards settled, is a contradiction in terms, since until the terms of the agreement are settled the party is perfectly at liberty to retire from the bargain: *Ridgway v. Wharton*, 6 H. L. Cas. 268.

5 *Crossley v. Maycock*, Law R. 18 Eq. 180, 181.

6 *Crossley v. Maycock*, Law R. 18 Eq. 180, 181.

7 *Methudy v. Ross*, 10 Mo. App. 101, 106.

8 *Potts v. Whitehead*, 20 N. J. Eq. 55, 58, 60.

9 *Rummens v. Robbins*, 3 De Gex, J. & S. 88, 93.

10 *Dominion Bank v. Knowlton*, 25 Grant U. C. 125, 130. And that before a formal acceptance thereof by the bank authorities, the writer was at liberty to withdraw the same: *Dominion Bank v. Knowlton*, 25 Grant U. C. 125, 130.

11 *Guardians of the Poor v. Petch*, 10 Ex. 610. Acceptance of shares: See *New Brunswick etc. Ry. Co. v. Muggridge*, 4 Hurl. & N. 160; *Boglead Manuf. Co. v. Montague*, 10 Com. B. N. S. 481.

§ 42. *Reduction to writing, etc.*—*As requisite to valid contract.* It is a general rule, applicable to contracts of sale,<sup>1</sup> that where parties enter into any agreement, and the understanding is that it is to be reduced to writing, or if it is already in written form, that it is to be signed before it is acted on or to take effect, it is not binding until it is so written or signed.<sup>2</sup> And there is no sale where a party assenting to deliver wood to a mining company fails to sign the written agreement embody-

ing the terms of the contract, and to furnish the required bond.<sup>3</sup>

*Estoppel to object to want of.* But where parties agree upon the terms of a contract which is to be reduced to writing but never is, and the parties on one side avail themselves of the benefit of the proposition, and go on under this agreement as though it had been in writing, they cannot be heard to say that it was understood that the contract was not to be binding unless reduced to writing.<sup>4</sup>

1 Morrill v. Tehama etc. Co. 10 Nev. 135.

2 See Boyd v. Hind, 36 Eng. L. & Eq. 566; Fisk v. Levine, 16 La. An. 29; Dodge v. Hopkins, 14 Wis. 630; Townsend v. Hubbard, 4 Hill, 351; Crane v. Portland, 9 Mich. 493.

3 Morrill v. Tehama etc. Co. 10 Nev. 125, 135, 136. Compare Northam v. Gordon, 46 Cal. 582.

4 Miller v. McManis, 57 Ill. 126, 130.

### § 43. Contract by telegraph. — *Permissibility and proof.*

A contract may be entered into by means of telegraphic dispatches;<sup>1</sup> and in cases where such communications are relied upon to establish contracts, they may be proved in the same manner as other writings, such as letters, etc.<sup>2</sup>

*Answer to letter, etc.* So the communication of one of the contracting parties may be by mail, and the reply thereto by telegraph,<sup>3</sup> and thus the contract be completed.<sup>4</sup>

*Acceptance as closing contract.* And where the offer to make a sale, such as a proposal to sell Mexican dollars, is sent by telegram, an acceptance signified in the same manner is a sufficient manifestation of concurrence to consummate the contract, irrespective of the time when it comes to the knowledge of the proposing party.<sup>5</sup>

*Qualified or conditional acceptance.* An offer by telegraph is not accepted when the reply, besides mis-

understanding the unintelligible proposal, contains a qualification, such as a requirement of the reservation of crops in a sale of land.<sup>6</sup> And a telegram referring to a previous letter which contained a conditional acceptance of an offer to sell property, cannot be construed as an absolute acceptance of the proposition.<sup>7</sup>

*Construction.* Telegrams communicating an offer and acceptance of the same though of doubtful scope, yet when acted on form a contract, governing the acts of the parties under the stipulations of the telegrams.<sup>8</sup> But where the telegrams are merely the preliminary arrangements for a final meeting, at which the business is to be closed out, they do not constitute a contract.<sup>9</sup> And where, in an action for an alleged breach of a written contract of sale made by telegraph, the telegrams fail to show what the property contracted for is, what the price to be paid for it is, and to whom it is sold, they are insufficient to establish a written contract and to take the case out of the statute of frauds.<sup>10</sup>

*Receipt of acceptance.* Regardless of the effect of sending an acceptance in ordinary cases, it has been held that the party making the offer may always, if he chooses, make the formation of the contract dependent upon the actual communication to himself of the acceptance.<sup>11</sup> Thus, if an offer is made by letter, in which the person making the offer requests an answer by telegraph "yes" or "no," and states that unless he receives the answer by a certain date he "shall conclude 'no,'" the offer is made dependent upon an actual receipt of the telegram on or before the date named, and without such receipt the contract is not completed.<sup>12</sup> And it has been held upon the same ground that there was no complete contract of sale of an interest in cattle to be secured at a distant point, where the proposed buyer thereof telegraphed "yes,"

as it had been arranged that he should do if he was willing to take a share of the property, but the dispatch never reached the other party.<sup>13</sup>

*Speedy acceptance required.* In case of a proposition by telegraph for the sale of certain goods, the market for which was subject to sudden and great fluctuations, the understanding will be construed to be that an immediate answer should be returned;<sup>14</sup> and an acceptance of such proposition telegraphed after a delay of twenty-four hours from the time of its receipt, has been held not an acceptance within a reasonable time,<sup>15</sup> and not to operate to complete the contract.<sup>16</sup>

*Evidence of oral acceptance.* Where a party who had acted as a broker for another, and had also dealt with him on his own account, telegraphed as follows: "Telegraph how much corn you will sell, with lowest cash price," to which the reply by telegraph was, "Three thousand cases, one dollar five cents, open one week," whereupon a counter-telegram was sent, reading: "Sold corn; will see you to-morrow," it was held incompetent in an action for the non-delivery of the corn, for the former broker and dealer to offer to show that at an interview on the next day, he verbally accepted the offer contained in the telegrams, that the other party promised to ship the corn to him, and that the last telegram referred to a resale by himself of the corn to a third party.<sup>17</sup>

1 See cases next cited. Contract by telegraph: See note to *Phila. Whiting Co. v. Detroit White Lead Works*, 24 N. W. Rep. 835; also, 14 Am. Law Reg. N. S. 401.

2 *Durkee v. Vt. Cent. R. R. Co.* 29 Vt. 127, 140. And see *Taylor v. Steamboat*, 20 Mo. 254, 259, 260. Requiring production: *Woods v. Miller*, 55 Iowa, 168. Proof of authenticity requisite: *Burt v. Winona* etc. R. R. Co. 31 Minn. 472, 473; *Adams v. Lumber Co.* 32 Minn. 216, 217.

3 See *Moulton v. Kershaw*, 59 Wis. 316; 48 Am. Rep. 516, n. 519; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Rommel v. Wingate*, 103 Mass. 327, 336; *Holton v. McPike*, 27 Kan. 286.

4 See *Prosser v. Henderson*, 20 Up. Can. Q. B. 433, 440; *Alford v. Wilson*, 20 Fed. Rep. 96. And compare *Lewis v. Browning*, 130 Mass.

173. Or a letter and telegram of acceptance in answer to an offer to sell coin may be sent on the same day: *Trevor v. Wood*, 33 N. Y. 307. Or the acceptance of a telegraphic offer of goods for sale may be made by telegram and later letter: *Byrne v. Van Tienhoven*, Law R. 5 C. P. D. 344; 30 Eng. Rep. 833.

5 *Trevor v. Wood*, 36 N. Y. 307, 309, 310. And see *Stevenson v. McLean*, Law R. 5 Q. B. D. 346; 29 Eng. Rep. 341; *Minnesota Oil Co. v. Collier Lead Co.* 4 Dill. 431, 434. But compare *Haas v. Myers*, 111 Ill. 421; 53 Am. Rep. 634, 635.

6 *Clay v. Rickets*, 23 N. W. Rep. 755; Sup. Ct. Iowa, June 6, 1885.

7 *Baker v. Holt*, 56 Wis. 100, 104.

8 *Duble v. Batts*, 38 Tex. 312, 313, 314.

9 *Martin v. Northwestern Fuel Co.* 22 Fed. Rep. 596. Where, however, bought and sold notes were to be exchanged by the parties to a contract, and in the same letter in which the one party had mailed the notes for signing he asked the other party to "cable confirmation of the contract," it was held that the confirmation was to be signified by the cablegram, and that the bought and sold notes could not be considered as the preliminaries to a contract, but as evidence of a contract already concluded: *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646, 649.

10 *Watt v. Wis. Cranberry Co.* 63 Wis. 730. Nor can oral testimony be admitted to supply the defects or omissions therein: *Watt v. Wis. Cranberry Co.* 63 Wis. 730. See chapter on STATUTE OF FRAUDS.

11 *Lewis v. Browning*, 130 Mass. 173, 175. And see *Household Fire Ins. Co. v. Grant*, Law R. 4 Ex. D. 216, 223; 31 Eng. 466, 472. Note to *Maclay v. Harvey*, 32 Am. Rep. 44; *Vassar v. Camp*, 11 N. Y. 441, 451; 1 *Langdell's Cases on Contracts*, 110, 117.

12 *Lewis v. Browning*, 130 Mass. 173, 175, 176.

13 *Haas v. Myers*, 111 Ill. 121; 53 Am. Rep. 634.

14 *Minn. Linseed Oil Co. v. Collier White Lead Co.* 4 Dill. 431, 436.

15 See § 35, on TIME FOR ACCEPTANCE.

16 *Minn. Lead Oil Co. v. Collier White Lead Co.* 4 Dill. 431, 435, 436.

17 *Lincoln v. Erie Preserving Co.* 132 Mass. 129.

§ 44. *Implied sales.—Express contract as excluding implied.* An implied contract cannot exist, where there is an existing express contract concerning the same subject-matter,<sup>1</sup> and where the provisions of the express contract were intended to control and supersede those which would otherwise be raised by implication.<sup>2</sup>

*Appropriation of goods by alleged purchaser.* But one who receives goods sent to him, knowing that the sender claims that the receiver has purchased them of him, cannot, in absence of mistake or fraud, appropriate them to his own use, and then disclaim the purchase.<sup>3</sup>

*Delivery and retention of part.* And where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he may, after the expiration of that time, recover the value of the part delivered to the purchaser and retained by him.<sup>4</sup>

1 Walker v. Brown, 28 Ill. 378, 383. And see Wood v. Edwards, 19 Johns. 212.

2 See Commercial Bank v. Pfeiffer, 22 Hun, 327, 335.

3 Wellauer v. Fellows, 48 Wis. 105, 109. And see Bartholomae v. Paul, 18 W. Va. 771, 779.

4 Oxendale v. Wetherell, 9 Barn. & C. 586, 587. And see Richardson v. Dunn, 2 Q. B. 218; Hart v. Mills, 15 Mees. & W. 85; Bowler v. Hoyt, 18 Pick. 355, 557. But see *contra*, Kein v. Tupper, 52 N. Y. 550, 555.



## CHAPTER IV.

### PARTIES.

- § 45. In general.
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- § 47. Intoxicated persons.
- § 48. Infant's sales and purchases.
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- § 55. Married women at common law.
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§ 45 In general.—*As element of sale.* Competent parties to enter into the contract are enumerated among the essential elements of a sale.<sup>1</sup> And a sale has been declared to be a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration.<sup>2</sup>

*Seller and buyer.* The seller is the one who parts with and passes the title to the thing ;<sup>3</sup> and this term is more usually applied in the sale of chattels, while that of vendor is commonly employed in the transfer of real property.<sup>4</sup> The buyer is the party to whom the transfer is made, and who thereby gains title to the subject of transfer ;<sup>5</sup> but it is convenient and customary to use the terms "vendee" and "purchaser" when referring to real property, and "buyer" when the sale is of personal property.<sup>6</sup>

*Who may sell.* As a general rule, all persons *sui juris* may be either buyers or sellers.<sup>7</sup> But only the owner,



or one acting in his behalf, can, ordinarily, sell goods and transfer a valid title to them, such as will avail even an innocent purchaser thereof.<sup>8</sup>

*Who may buy.* There is a class of persons who are incapable of purchasing, except *sub modo*,<sup>9</sup> as infants and married women, insane persons and drunkards ;<sup>10</sup> and another class, consisting of those who, in consequence of their peculiar confidential relation toward the owner of the thing sold,<sup>11</sup> are totally incapable of becoming purchasers while that relation exists.<sup>12</sup>

1 See *Gardner v. Lane*, 12 Allen, 39, 43.

2 *Creveling v. Wood*, 95 Pa. St. 152, 158. And see *Eldridge v. Kuehl*, 27 Iowa, 160, 163 ; *Winfield's Words*, etc. 547.

3 See citations in last note.

4 2 *Bouvier Law Dict.* (15th ed.) 626. And see *Coles v. Perry*, 7 Tex. 109, 135.

5 See *Eldridge v. Kuehl*, 27 Iowa, 160, 173 ; *Creveling v. Wood*, 95 Pa. St. 152, 158.

6 2 *Abbott's Law Dict.* 628. And see *Coles v. Perry*, 7 Tex. 109, 135.

7 2 *Bouvier Law Dict.* (15th ed.) 696.

8 See *Klein v. Seibold*, 89 Ill. 540, 542 ; *Bearce v. Bowker*, 115 Mass. 129, 132 ; *Breckenridge v. McAfee*, 54 Ind. 141, 149 ; chapter on TRANSFER OF TITLE.

9 See 2 *Blackst. Com.* 291 ; *Allis v. Billings*, 6 Met. 415 ; 39 Am. Dec. 744, 746.

10 2 *Bouvier Law Dict.* (15th ed.) 607.

11 See *Michoud v. Girod*, 4 How. 503, 555, fully discussing subject.

12 2 *Bouvier Law Dict.* (15th ed.) 607. These are trustees, guardians, assignees of insolvents, and generally all persons who, by their connections with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like : 2 *Bouvier Law Dict.* (15th ed.) 607. Attorney's purchase of litigious rights : *Denny v. Anderson*, 36 La. An. 762 ; 19 *The Reporter*, 338.

§ 46. **Insane and incompetent persons.**—*Contracts voidable.* Persons deranged in intellect stand substantially on the same footing as infants with regard to the voidable character<sup>1</sup> of contracts made by them ;<sup>2</sup> and it may be shown by or for such a party that at the time of a purchase the buyer was not of capacity to contract.<sup>3</sup>

*When sales, etc., sustained.* Yet the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding;<sup>4</sup> and this view is particularly favored where no advantage is taken of the person of unsound mind, and the contract has been wholly or partially performed,<sup>5</sup> so that the parties cannot be completely restored<sup>6</sup> to their position.<sup>7</sup>

*Necessaries.* A purchase of necessaries which are used by a lunatic is, however, unquestionably valid where no advantage is taken of his condition.<sup>8</sup>

1 See note to *Jackson v. King*, 15 Am. Dec. 364; *Rusk v. Fenton*, 14 Bush, 490; 29 Am. Rep. 413, 415; *Fitzgerald v. Reed*, 9 Smedes & M. 94, 102.

2 *Hallett v. Oakes*, 1 Cush. 296, 298, 299. And see *Breckenridge v. Ormsby*, 1 Marsh. J. J. 236, 238; 19 Am. Dec. 71; *Lincoln v. Buckmaster*, 32 Vt. 652, 661. But compare *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209, 210; *Burke v. Allen*, 29 N. H. 106, 117; *Ewell's Lead. Cas.* 576, 585.

3 *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17; *Ewell's Lead. Cas.* 614. Presumption of sanity: *Titcomb v. Vantyle*, 84 Ill. 371, 373; *McCarty v. Kearnan*, 86 Ill. 291, 295; *Lilly v. Waggoner*, 29 Ill. 395, 397.

4 *Elliott v. Ince*, 7 De Gex, M. & G. 475, 488; *Carr v. Holiday*, 5 Ired. Eq. 167; *McCormick v. Littler*, 85 Ill. 62, 65; 23 Am. Rep. 610. But compare *Lincoln v. Buckmaster*, 32 Vt. 652. Deed of lunatic deemed inoperative: *Manning v. Gill*, Law R. 13 Eq. 485.

5 See note to *Jackson v. King*, 15 Am. Dec. 366.

6 See note last cited, at p. 367.

7 *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17; *Ewell's Lead. Cas.* 614, 626, and cases reviewed. And see *Beavan v. McDonnell*, 9 Ex. 309; 10 Ex. 184; *Niell v. Morley*, 9 Ves. Jr. 478; *Ewell's Lead. Cas.* 628; *Mut. Life Ins. Co. v. Hunt*, 14 Hun, 169, 172; *Rusk v. Fenton*, 14 Bush, 490; 29 Am. Rep. 413, 415; *Campbell v. Hill*, 23 Up. Can. C. P. 473. But compare *Seaver v. Phelps*, 11 Pick. 304; 22 Am. Dec. 372; *Ewell's Lead. Cas.* 610.

8 *Dane v. Kirkwall*, 8 Car. & P. 697; *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170; *Ewell's Lead. Cas.* 632; *Nelson v. Dunscombe*, 9 Beav. 211. And see *Hallett v. Oakes*, 1 Cush. 296, 298; *McCrillis v. Bartlett*, 8 N. H. 569, 571; *Kendall v. May*, 10 Allen, 59, 67; *Richardson v. Strong*, 13 Ired. 103; *Sawyer v. Lufkin*, 56 Me. 308; note to *Jackson v. King*, 15 Am. Dec. 363; *Hall v. Butterfield*, 59 N. H. 354; 43 Am. Rep. 203, 211.

§ 47. *Intoxicated persons.—Extent of intoxication.* Contracts to the prejudice of drunken persons,<sup>1</sup> who are

so intoxicated that they are incapable of exercising their judgment,<sup>2</sup> and do not know what they are doing,<sup>3</sup> have no validity<sup>4</sup> against them.<sup>5</sup>

*Contracts voidable, etc.* Such purchases,<sup>6</sup> and other contracts, however, are not absolutely void,<sup>7</sup> but merely voidable,<sup>8</sup> whether the drunkenness be voluntary, or occasioned by the contrivance of the other party.<sup>9</sup>

*Liability for necessities.* But intoxicated persons are liable for necessities supplied to them while in an inebriated condition, and retained when sober.<sup>10</sup>

1 See generally note to *Wadsworth v. Sharpstein*, 59 Am. Dec. 501.

2 See *Schramm v. O'Connor*, 98 Ill. 539, 543.

3 See *Taylor v. Patrick*, 1 Bibb, 168, 169; *Makins v. Lightner*, 13 Ill. 282, 284, 285.

4 Drunkenness of maker of promissory note held no defense: *State Bank v. McCoy*, 69 Pa. St. 204; 8 Am. Rep. 246; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306.

5 *Gore v. Gibson*, 13 Mees. & W. 623; *Ewell's Lead. Cas.* 736; 2 Kent Com. 451. And see *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17; *Ewell's Lead. Cas.* 614, 625; *Fenton v. Halloway*, 1 Stark. 126; *Pitt v. Smith*, 3 Camp. 33; *Cook v. Clayworth*, 18 Ves. Jr. 12. Compare *Caloway v. Witherspoon*, 5 Ired. Eq. 123.

6 See *Reynolds v. Waller*, 1 Wash. (Va.) 164.

7 But see *Clark v. Cadwell*, 6 Watts, 139.

8 See *Arnold v. Hickman*, 6 Munf. 15; *Taylor v. Patrick*, 1 Bibb, 168, 169; *Reinecker v. Smith*, 2 Har. & J. 421; *Broadwater v. Dame*, 10 Mo. 277, 286; *Carpenter v. Rogers*, 22 The Reporter, 157.

9 *Barrett v. Buxton*, 2 Aik. 167, 168, 170; *Ford v. Hitchcock*, 8 Ohio, 214.

10 See *Gore v. Gibson*, 13 Mees. & W. 623; *Ewell's Lead. Cas.* 734, 737; *McCrillis v. Bartlett*, 8 N. H. 569, 571.

§ 48. *Infant's sales and purchases.* — *Voidable character of transactions.* The tendency of the modern decisions is to hold most of the acts and contracts of infants voidable only,<sup>1</sup> and not void;<sup>2</sup> so that in general, on attaining majority, the transaction may be ratified or disaffirmed by such former minors.<sup>3</sup>

*Ratification of purchase after majority.* Thus, an infant after reaching the age of majority may ratify a prior purchase, as by retaining and using the goods for an unreasonable time.<sup>4</sup>

*Time to disaffirm sale or purchase.* And even while still under age, an infant purchaser may maintain an action against the seller, at least where the contract is in part executed by the infant, and it is for his benefit that he should be enabled to sue upon it,<sup>5</sup> though it sometimes has been held that a sale and delivery of goods by an infant is not voidable by him till he comes of age.<sup>6</sup>

*Enforcing delivery.* But an infant who contracts with an adult to purchase chattels, cannot insist upon performance of the contract by delivery on the part of the latter, while failing to make payment as stipulated, and thus perform his own part of the agreement.<sup>7</sup>

1 See *Zouch v. Parsons*, 3 Burr. 17, 94; 2 Kent Com. 235; and consult discussion of subject in 13 Am. Law Rev. 280; also *Klein v. Beebe*, 6 Conn. 494, 502, 503; *Little v. Duncan*, 9 Rich. 55; 64 Am. Dec. 760, 761, 762; *Fetrow v. Wiseman*, 40 Ind. 149, 150, 152; *Vent v. Osgood*, 19 Pick. 572, 573; *Tucker v. Moreland*, 10 Peters, 53, 71.

2 Distinction noted in general: *Stevens v. Hyde*, 32 Barb. 171, 176; *Somes v. Brewer*, 2 Pick. 184, 191; 13 Am. Dec. 406; *Cummings v. Powell*, 8 Tex. 80, 85.

3 See 2 Kent Com. 235; *N. H. Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345, 348. But compare *Ex parte Kibble*, Law R. 10 Ch. 373. Knowledge of non-liability not necessary to make affirmance binding: *Anderson v. Soward*, 40 Ohio St. 325; 48 Am. Rep. 637, 638.

4 *Boyden v. Boyden*, 9 Met. 521. And see *Green v. Wilding*, 59 Iowa, 679, 681; 44 Am. Dec. 636, 697; 22 Am. Law Reg. 271, n. 273.

5 *Warwick v. Bruce*, 2 Maule & S. 205, 209.

6 *Roof v. Stafford*, 7 Cowen, 179, 181, 183. But see *contra*, *Towle v. Dresser*, 73 Me. 252, 256, 257; *Hall v. Butterfield*, 59 N. H. 304; 47 Am. Rep. 209, 213.

7 *Biedeman v. O'Connor*, 7 N. E. Rep. (Ill.) 463.

§ 49. *Infant's necessities.—Common-law liability.* An infant has authority at common law to make binding contracts<sup>1</sup> for necessities.<sup>2</sup>

*Support supplied by parents, etc.* And it has been held in some of the cases in England that a purchase of necessities on credit by an infant may be valid, irrespective of the question whether he has an allowance sufficient to enable him to supply himself with neces-

saries.<sup>3</sup> But the rule seems to be otherwise in this country;<sup>4</sup> and it has recently been laid down that the question of what constitutes necessities for an infant must be determined by the actual state of each case, and not by appearances in regard to the support supplied by parents or guardians.<sup>5</sup>

*Scope of term "necessaries."* The term "necessaries"<sup>6</sup> is not restricted to the absolute necessities of life,<sup>7</sup> as meat, drink, apparel, and lodgings;<sup>8</sup> but it also embraces articles suitable to the condition, rank, fortune, and general needs of the infant.<sup>9</sup> Yet in general, articles of mere luxury are always excluded;<sup>10</sup> though luxurious articles of utility are in some cases allowed.<sup>11</sup> Necessaries for an infant's wife and children are necessities for him.<sup>12</sup> But a horse has been held not within the denomination of necessities for which an infant is liable.<sup>13</sup>

*Province of court and jury.* And it is declared to be the well-settled rule that it is the province of the court to determine whether the articles sued for are within the class of necessities;<sup>14</sup> and if so, it is the proper duty of the jury to pass upon the question of their quantity, quality, and adaptation to the condition and wants of the infant.<sup>15</sup>

1 See *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209, 212. Money spent for necessities: *Price v. Sanders*, 60 Ind. 310, 314.

2 *Hands v. Slaney*, 8 Term Rep. 578, 579. And see *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463, 465; *Cole v. Pennoyer*, 14 Ill. 153, 160; 2 Kent Com. 239; *Fetrow v. Wiseman*, 40 Ind. 148.

3 See *Burghart v. Hall*, 4 Mees. & W. 727; *Peters v. Fleming*, 6 Mees. & W. 42. But see *Baines v. Toy*, 41 L. T. N. S. 292; 18 The Reporter, 232.

4 *Davis v. Caldwell*, 12 Cush. 512, 513. And compare *Strong v. Foote*, 42 Conn. 203, 205; *Lefils v. Sugg*, 15 Ark. 137, 139; 2 Kent Com. 239; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449, 451; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652, 653; *Freeman v. Bridges*, 4 Jones, 1; 67 Am. Dec. 258, 260. Poverty of parent immaterial: *Hoyt v. Casey*, 114 Mass. 397; 19 Am. Rep. 371, 373.

5 *Trainer v. Trumbull*, 22 The Reporter (Mass.) 135, 136. And see *Angel v. McLellan*, 16 Mass. 31; *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512.

6 See *Freeman v. Bridges*, 4 Jones, 1; 67 Am. Dec. 258, 259.

7 See *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209, 213.

8 See cases cited in next note. But see *contra*, *Shelton v. Pendleton*, 13 Conn. 417, 423. And consult *N. H. Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345, 350, 351.

9 See *Cripps v. Hill*, 6 Q. B. 606, 611; *Chapple v. Cooper*, 13 Mees. & W. 252, 258; *Rundel v. Keeler*, 7 Watts, 237, 239; *Strong v. Foote*, 32 Conn. 203, 205; *Tupper v. Cadwell*, 12 Met. 559, 562; *Breed v. Judd*, 1 Gray, 455, 458. Enumeration of infant's necessities: *Schouler on Domestic Relations* (3d ed.) §§ 411-413. Burden of proof to show that articles are necessities: *Wood v. Losey*, 50 Mich. 475, 477; 22 Am. Law Reg. 605, n. 607.

10 *Chapple v. Cooper*, 13 Mees. & W. 252, 258. And see *Ryder v. Wombwell*, Law R. 3 Ex. 90; *Price v. Sanders*, 60 Ind. 310, 314; *McKanna v. Merry*, 61 Ill. 177, 179.

11 *Chapple v. Cooper*, 13 Mees. & W. 252, 258. And see *Ryder v. Wombwell*, Law R. 3 Ex. 90.

12 *Chapple v. Cooper*, 13 Mees. & W. 252, 259. And see *Abell v. Warren*, 4 Vt. 149, 152; *Tupper v. Cadwell*, 12 Met. 559, 562; *Price v. Sanders*, 60 Ind. 310, 315. Compare *Anderson v. Smith*, 33 Md. 465; *Freeman v. Bridger*, 4 Jones, 1; 67 Am. Dec. 258, 259.

13 *Rainwater v. Durham*, 2 Nott & McC. 524, 525; 10 Am. Dec. 637. And see *Merriam v. Cunningham*, 11 Cush. 40, 44; *Grace v. Hale*, 2 Humph. 27, 30; 36 Am. Dec. 296. But compare *Hart v. Prater*, 1 Jur. 623. Buggy for clerk not a necessary: *Howard v. Simpkins*, 70 Ga. 322, 325.

14 See cases next cited.

15 *Merriam v. Cunningham*, 11 Cush. 40, 44. And see *Decell v. Lewenthal*, 57 Miss. 331, 336; 34 Am. Rep. 449, 450; *Davis v. Caldwell*, 12 Cush. 514. Compare 2 Kent Com. (13th ed.) 311, n. 1; *Mohney v. Evans*, 51 Pa. St. 80, 83; *McKanna v. Merry*, 61 Ill. 177, 179.

§ 50. **Express contract for necessities.** — *Held not binding.* According to some of the authorities, an infant cannot bind himself by an express contract, even for necessities,<sup>1</sup> so as to become liable to pay a definite instead of a reasonable sum therefor;<sup>2</sup> and he has therefore been held not liable on an account stated for necessities,<sup>3</sup> or on an accepted bill of exchange therefor,<sup>4</sup> nor, it seems, on a promissory note therefor.<sup>5</sup>

*When and how far held binding.* But other cases hold that an infant may bind himself by an express contract for necessities, if the form of the contract is such that the consideration may be inquired into;<sup>6</sup> and that a negotiable note of an infant may be shown to have been given in part for necessities, whose fair value is alone

recoverable thereon.<sup>7</sup> And the question whether or not an infant made an express promise to pay for necessities has lately been declared not important, since he is not held, strictly speaking, on his actual promise, but on a promise implied by law to pay only what the necessities were reasonably worth, instead of what he may have improvidently agreed to pay for them.<sup>8</sup>

1 See *Hussey v. Jewett*, 9 Mass. 100, 101; *Martin v. Gale*, Law R. 4 Ch. D. 423; 20 Eng. Rep. 660, 662; *Vent v. Osgood*, 19 Pick. 572, 575. And compare *McCrillis v. How*, 3 N. H. 348, 349.

2 See *Beeler v. Young*, 1 Bibb, 519, 521; *Hyer v. Hyatt*, 3 Cranch C. C. 276, 282; *Locke v. Smith*, 41 N. H. 346; *Parsons v. Keys*, 43 Tex. 557, 559.

3 *Trueman v. Hurst*, 1 Term Rep. 40, 42. And see *Inglelew v. Douglass*, 2 Stark. 36. But compare generally *Williams v. Moor*, 11 Mees. & W. 256. And see *contra*, *Dubose v. Whedden*, 4 McCord, 221, 222.

4 *Williams v. Watts*, 1 Camp. 552.

5 See *Bouchell v. Clary*, 3 Brev. 194, 195; *Trueman v. Hurst*, 1 Term Rep. 40. *Contra*, *Dubose v. Whedden*, 4 McCord, 221, 222. In general, it is the well-settled rule that a negotiable note of an infant is not void, but voidable only, and capable of ratification: *Goodsell v. Myers*, 3 Wend. 479, 481; *Lawson v. Lovejoy*, 8 Greenl. 405; 23 Am. Dec. 526; *Whitney v. Dutch*, 14 Mass. 457, 462; *Reed v. Batchelder*, 1 Met. 559, 569; *Aldrich v. Grimes*, 10 N. H. 194; *Philpot v. Sandwich Manuf. Co.* 24 N. W. Rep. (Neb.) 428.

6 *Stone v. Dennison*, 13 Pick. 1, 6, 7; 23 Am. Dec. 654. And see *Breed v. Judd*, 1 Gray, 455, 559.

7 *Earle v. Reed*, 10 Met. 387, 390. And see *Bradley v. Pratt*, 32 Vt. 378, 384.

8 *Trainer v. Trumbull*, 22 The Reporter (Mass.) 135, 136.

§ 51. **Trading purchases of infants.**—*No liability as for necessities.* An infant is not liable to pay for goods as being necessities, where they are furnished him for his trade or business.<sup>1</sup>

*Void under strict rule.* And the trading contracts of an infant have sometimes been declared void as against public policy.<sup>2</sup>

*Voidable under modern tendency.* But the tendency of modern decisions is to hold all the contracts of infants which might be deemed void, merely voidable,<sup>3</sup> so as to be capable of ratification by the infant at his election.<sup>4</sup>

1 Decell v. Lewenthal, 57 Miss. 331, 336; 34 Am. Rep. 449, 450; Whywall v. Champion, Strange, 1083. And see Mason v. Wright, 13 Met. 306; Grace v. Hale, 2 Humph. 27, 30; 36 Am. Dec. 296. But he becomes liable for so much of goods supplied to him to trade with as are consumed as necessities in his own family: Tuberville v. Whitehouse, 1 Car. & P. 94. Compare Mohney v. Evans, 51 Pa. St. 80, 83.

2 Thornton v. Illingworth, 2 Barn. & C. 824, 826. And see Belton v. Hodges, 9 Bing. 365, 370; Ex parte Jones, Law R. 18 Ch. D. 109. But compare Williams v. Moor, 11 Mees. & W. 256, 264; Warwick v. Bruce, 2 Maule & S. 205, 209.

3 See § 48, on INFANT'S SALES, etc.

4 See Reed v. Batchelder, 1 Met. 559, 560; Earl v. Reed, 10 Met. 387, 389; Kennedy v. Doyle, 10 Allen, 161; Abell v. Warren, 4 Vt. 152, 154; Hardy v. Waters, 38 Me. 450, 451; Mustard v. Wohlford, 15 Gratt. 329, 337; Weaver v. Jones, 24 Ala. 420, 424; Cole v. Pennoyer, 14 Ill. 153, 160; Fetrow v. Wiseman, 40 Ind. 148, 151; Cummings v. Powell, 8 Tex. 80, 90; Schouler on Domestic Relations (3d ed.) § 403.

§ 52. *Misrepresentation of age by infant.*—*Title of innocent purchaser.* A minor who obtains goods by representing himself untruly to be of full age and legally responsible, is answerable under the criminal law for obtaining goods under false pretenses,<sup>1</sup> and is consequently guilty of such fraud as will render the sale subject to avoidance by the seller;<sup>2</sup> but if the seller does nothing in disaffirmance, an innocent purchaser for value takes title.<sup>3</sup>

*No estoppel of infant.* And according to the weight of authority, an infant is not estopped from pleading infancy to an action for the price of goods, not necessities, by the fact that he represented himself to be of age when he bought the goods, and the seller relied on that representation.<sup>4</sup>

*Infant's recovery of consideration.* So where an infant falsely representing himself to be of full age, bought a wagon, paying part, and giving his note secured by a lien on the wagon for the remainder, and after using the wagon until the use was worth more than what he had paid, and until it had depreciated by more than a like sum, made default in payment, whereupon the seller took the wagon under his lien and sold it at



auction, it was held that the buyer could recover in assumpsit for the money he had paid.<sup>5</sup>

1 See 2 Wharton's Criminal Law, 2099.

2 *Neff v. Landis*, 1 Atl. Rep. 177; 21 Cent. L. J. 441; Sup. Ct. Pa. Oct. 5, 1885. And the latter may affirm the contract by suing in assumpsit, or disaffirm by suing in trover or replevin: *Neff v. Landis*, 1 Atl. Rep. 177; 21 Cent. L. J. 441. Compare *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105, 108.

3 *Neff v. Landis*, 1 Atl. Rep. 177; 21 The Reporter, 60.

4 *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412, n. 413. And see *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676, 677; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Studwell v. Shafter*, 54 N. Y. 249; *Gilson v. Spear*, 38 Vt. 311; *Brown v. McCune*, 5 Sand. 228.

5 *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678.

§ 53. *Ratification after majority.* — *Ratification in writing.* In England, a ratification of a contract by an infant on attaining majority, prior to the recent enactment rendering any ratification invalid,<sup>1</sup> was required to be made in writing;<sup>2</sup> and such is also the statutory rule in several of the States.<sup>3</sup>

*Modes of ratification.* But in the absence of any statute providing how a contract shall be ratified, any one of three modes ordinarily will be sufficient: (1) An express ratification; (2) acts which imply an affirmance; (3) the omission to disaffirm in a reasonable time.<sup>4</sup>

*Direct promise.* Yet according to many of the cases, a direct promise, when the infant comes of age, is necessary to establish a contract made during minority,<sup>5</sup> and a mere acknowledgment will not have that effect.<sup>6</sup>

*Acquiescence in sale, etc.* So it has been laid down that acquiescence alone does not confirm the contract, where the infant has been paid for goods sold and delivered, though the collection of a price, bill or note, in whole or part, would affirm the transfer.<sup>7</sup>

*Retaining property purchased.* But if a minor purchaser retains the property bought, and uses it for his

own purposes for an unreasonable time after coming of age, and does not restore it to the seller or give him notice of an intention to avoid the contract, this operates as a ratification of the contract,<sup>8</sup> and renders the buyer liable for the price of the goods.<sup>9</sup>

1 See *Ex parte Kibble*, Law R. 10 Ch. 373, 377.

2 See *Harris v. Wall*, 1 Ex. 122, 129; *Schouler on Domestic Relations* (3d ed.) § 433. And compare *Maccord v. Osborne*, Law R. 1 C. P. D. 568; 18 Eng. Rep. 197; *Rawley v. Rawley*, Law R. 1 Q. B. D. 460; 17 Eng. Rep. 121.

3 See *Thurlow v. Gilmore*, 40 Me. 378, 380, 381; *Bonney v. Reardin*, 6 Bush, 34.

4 *Philpot v. Sandwich Manuf. Co.* 24 N. W. Rep. (Mich.) 428. And see *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 30; *Kline v. Beebe*, 6 Conn. 494, 505; *Hoit v. Underhill*, 9 N. H. 436, 439; 34 Am. Dec. 148; *Little v. Duncan*, 9 Rich. 55; 64 Am. Dec. 760, 762.

5 See cases cited in next note.

6 *Proctor v. Sears*, 4 Allen, 95. And see *Smith v. Mayo*, 9 Mass. 64; *Thompson v. Lay*, 4 Pick. 48, 49; 16 Am. Dec. 325; *Peirce v. Tobey*, 5 Met. 168, 172; *Martin v. Mayo*, 10 Mass. 137; *Wilcox v. Roath*, 12 Conn. 550, 556; *Hoit v. Underhill*, 9 N. H. 436, 439; *Smith v. Kelley*, 13 Met. 309, 310; *Benham v. Bishop*, 9 Conn. 330, 333; *Hinely v. Marguritz*, 3 Pa. St. 428; *Millard v. Hewlett*, 19 Wend. 301, 302; *Hodges v. Hunt*, 22 Barb. 150, 151; *Catlin v. Haddox*, 49 Conn. 492, 497, 498; 11 Am. Rep. 249, 251, 252; *Bigelow v. Grannis*, 2 Hill, 120, 121. But see note to *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 30; *Henry v. Root*, 33 N. Y. 526, 529, and cases reviewed; *Lawson v. Lovejoy*, 8 Greenl. 405; 23 Am. Dec. 526, 527.

7 *Boody v. McKenney*, 23 Me. 517, 525.

8 See cases cited in next note.

9 See *Boyden v. Boyden*, 9 Met. 519, 521; *Boody v. McKenney*, 23 Me. 517, 525; *Aldrich v. Grimes*, 10 N. H. 194, 197; *Schouler on Domestic Relations*, § 441. And compare *Henry v. Root*, 33 N. Y. 526; *Farr v. Sumner*, 12 Vt. 28, 32; 36 Am. Dec. 327.

§ 54. **Disaffirming transaction.**—*Rescission of sale before majority.* A sale and delivery of personal property by a minor, may be rescinded by the minor before arriving at full age.<sup>1</sup>

*Restoration of property or consideration.* But in general, if the infant rescinds the contract, and seeks to recover the article sold by him, he must restore the property or consideration received, before he can maintain his action for the property sold.<sup>2</sup>

*Tender.* Yet a distinction is taken in this respect between executory and executed contracts made by an

infant, to the effect that in the latter case he must, in equity, tender before suit any of the property or consideration still retained by him.<sup>3</sup>

*Use or consumption.* But it is generally otherwise, where the infant has used or consumed the property or consideration during his minority.<sup>4</sup>

*Allowing for benefit.* It is stated to be the established rule in New Hampshire, however, that a person seeking to avoid his purchase of articles not necessities, or other contract, on the ground of infancy, must restore what he has received under it, if it remains *in specie* and under his control, and otherwise must allow for the benefit derived therefrom.<sup>5</sup>

1 Carr v. Clough, 26 N. H. 280; 59 Am. Dec. 345, 347, 349. And see Robinson v. Weeks, 53 Me. 102, 106; Vent v. Osgood, 19 Pick. 572, 573; 2 Kent Com. 237, n.; Bool v. Mix, 17 Wend. 119; 31 Am. Dec. 285, 291; Price v. Furman, 27 Vt. 568; 65 Am. Dec. 194, 195.

2 Carr v. Clough, 26 N. H. 280; 59 Am. Dec. 345, 349. And see Badger v. Phinney, 15 Mass. 359; 8 Am. Dec. 105, 108; Farr v. Sumner, 12 Vt. 28; 36 Am. Dec. 327, 328; Taft v. Pike, 14 Vt. 405; 39 Am. Dec. 228, 230; Kitchen v. Lee, 11 Paige, 107; 42 Am. Dec. 101, 102; Manning v. Johnson, 26 Ala. 446; 62 Am. Dec. 732, 733, and exhaustive note, 734; Price v. Furman, 27 Vt. 268; 65 Am. Dec. 194, 196; Bingham v. Barley, 55 Tex. 281; 40 Am. Rep. 801, 802.

3 Eureka Co. v. Edwards, 71 Ala. 248; 46 Am. Rep. 314, 315.

4 Eureka Co. v. Edwards, 71 Ala. 248; 46 Am. Rep. 314, 316. And see Brantley v. Wolf, 60 Miss. 420, 433.

5 See Heath v. Stevens, 43 N. H. 251, 252; Hall v. Butterfield, 59 N. H. 354; 47 Am. Rep. 209, 213, 215; Bartlett v. Bailey, 59 N. H. 408, 409.

§ 55. *Married women at common law. — General rule.* At common law, it is the general rule that the contracts of married women are not merely voidable, but absolutely void,<sup>1</sup> so that they cannot be ratified even when the coverture has ceased.<sup>2</sup> Hence, a married woman cannot make a valid purchase on her own account, even for necessities, although she is living apart from her husband, and has a separate maintenance by deed.<sup>3</sup>

*Exceptions.* But there are exceptions to the rule, which are variously stated, but which may be broadly declared to arise when the husband is regarded as

civilly dead,<sup>4</sup> as when he has abjured the realm, or has been banished,<sup>5</sup> or transported as a convict;<sup>6</sup> when he is an alien and resident abroad;<sup>7</sup> and by the custom of London, when the wife is a sole trader.<sup>8</sup> In this country the exception arising when the husband has abjured the realm, etc., has been applied in all cases in which the husband has abandoned and deserted his wife and accepted an abode or residence in another State or jurisdiction.<sup>9</sup>

1 *Zouch v. Parsons*, 3 Burr. 1734, 1805; *Ewell's Lead. Cas.* 3, 14. And see *Kelso v. Tabor*, 52 Barb. 123, 128.

2 See citations in last note.

3 *Marshall v. Rutton*, 8 Term Rep. 545. See, also, 2 Kent Com. 160; *Hyde v. Price*, 3 Vcs. Jr. 431, 445; *Lewis v. Lee*, 3 Barn. & C. 231, 237. Married women's necessities: See *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695, n. 697.

4 See *Robinson v. Reynolds*, 1 Aiken, 174; 2 Kent Com. 155, n.

5 See 1 Blackst. Com. 443.

6 *Ex parte Franks*, 7 Bing. 762; *Sparrow v. Carruthers*, 1 Term Rep. 6, n.; *Carroll v. Blacow*, 4 Esp. 27.

7 *Derry v. Mazarine*, 1 Raym. Ld. 147; *Burfield v. De Pienne*, 2 Bos. & P. N. R. 380, 381. And see *De Gaillon v. L'Aigle*, 8 Bos. & P. 357. But compare *Kay v. Duchessee de Pienne*, 3 Camp. 123; *Williamson v. Dawes*, 9 Bing. 232; *Farrar v. Countess of Granard*, 1 Bos. & P. 80, 81; *Marsh v. Hutchinson*, 2 Bos. & P. 226; *Baggett v. Frier*, 11 East, 301, 303; *Barden v. Keverberg*, 2 Mees. & W. 61; *De Wahl v. Braune*, 1 Hurl. & N. 173; 2 Kent Com. 157; *Robinson v. Reynolds*, 1 Aiken, 174, 177.

8 *Beard v. Webb*, 2 Bos. & P. 93. And see § 53, on SOLE TRADERS BY CUSTOM.

9 *Phelps v. Walther*, 78 Mo. 320; 47 Am. Rep. 112; citing other local cases; and *Abbott v. Bayley*, 6 Pick. 89; *Gregory v. Pierce*, 4 Met. 473; *Gregory v. Paul*, 15 Mass. 31; *Cornwall v. Hoyt*, 7 Conn. 427; *Osborn v. Nelson*, 59 Barb. 375; *Bean v. Morgan*, 4 McCord, 148; *Clark v. Valentine*, 41 Ga. 143; *Roland v. Logan*, 18 Ala. 307; *Love v. Moynahan*, 16 Ill. 277; *Rhea v. Rhenner*, 1 Peters, 103. But it has been held that the husband's desertion alone will not render the wife liable even for necessities: *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762, n. 764.

§ 56. In equity.—*British rule.* The British rule in equity is that a married woman may bind her separate property, though not in advance of her acquisition of the same,<sup>1</sup> whether by ordering goods or otherwise,<sup>2</sup> if she has purported and intended to contract, and was understood by the other party to contract, not for her

husband, but for herself, and on the credit of her separate estate.<sup>3</sup>

*Intention inferable.* Such intention need not be expressed, but may be inferred from the nature of the contract itself,<sup>4</sup> and is readily inferred if the married woman is at the time living separate from her husband.<sup>5</sup>

*American views.* Similar views are laid down in some of the cases in New York,<sup>6</sup> New Jersey,<sup>7</sup> and Connecticut.<sup>8</sup> But the general current of American authorities supports the principle that the separate estate of a married woman is not chargeable with her debts and obligations, unless where a provision for that purpose is contained in the instrument creating her separate estate.<sup>9</sup>

1 Pike v. Fitzgibbon, Law R. 17 Ch. D. 454.

2 See cases next cited.

3 Mrs. Matthewman's Case, Law R. 3 Eq. 781, 787. And see Picard v. Hine, Law R. 5 Ch. App. 274; Shattock v. Shattock, Law R. 2 Eq. 182; Johnson v. Gallagher, 30 Law J. Ch. 298; Butler v. Cumpston, Law R. 7 Eq. 16, 21; La Touche v. La Touche, 3 Hurl. & C. 576.

4 Mrs. Matthewman's Case, Law R. 3 Eq. 781, 787; Picard v. Hine, Law R. 5 Ch. App. 274, 277; London Chartered Bank v. Lem-priere, Law R. 4 P. C. App. 572, 593.

5 Picard v. Hine, Law R. 5 Ch. App. 274, 277.

6 Bank of Watkins v. Miller, 63 N. Y. 639. But compare Yale v. Dederer, 68 N. Y. 329, 335; Kelly on Contracts of Married Women, 461. And see Manchester v. Sahler, 47 Barb. 155, 157; Kelso v. Tabor, 52 Barb. 125, 128; Bogert v. Gulick, 65 Barb. 322, 324; Lennox v. Eldred, 65 Barb. 410, 412; Downing v. O'Brien, 67 Barb. 582, 584; Conlin v. Cantrell, 64 N. Y. 217; Gosman v. Cruger, 69 N. Y. 87.

7 See Johnson v. Cummings, 16 N. J. Eq. 97, 104. But compare Armstrong v. Ross, 20 N. J. Eq. 109, 119; Kelly on Contracts of Married Women, 451, 452.

8 Wells v. Thorman, 37 Conn. 318, 319. And see Craft v. Ralland, 37 Conn. 491, 498; Kelly on Contracts of Married Women, 340.

9 Willard v. Eastham, 15 Gray, 328, 332. Consult further, Schouler on Husband and Wife, § 246.

§ 57. *Under statutes.*—*English Married Women's Acts.* Legislation of recent origin in England, even prior to the latest comprehensive enactment on the subject,<sup>1</sup> had modified the strict rules of the common law, and empowered a wife deserted by her husband to obtain an

order to protect and dispose of her earnings and property as if she were judicially separated,<sup>2</sup> while the Married Women's Property Act of 1870 provided for her separate trading and control of her acquisitions and investments.<sup>3</sup> Accordingly, where a butcher was afflicted with delirium tremens, his wife, who carried on her husband's business upon her separate resources, without objection on his part, could buy meat upon her own credit free from liability for her husband's debts;<sup>4</sup> and so a woman who after her marriage continued her fruit-preserving business in her maiden name, and established it on a wholesale basis, would on becoming a widow be protected against the administrator of her late husband.<sup>5</sup> And now under the English Married Women's Property Act of 1882 wives are enabled to acquire, hold, and dispose of every species of property,<sup>6</sup> are allowed to contract, sue and be sued apart from their husbands, are made subject to the bankruptcy laws in their separate business,<sup>7</sup> and are protected as before in their wages and earnings and in the proceeds of their skill, as well as in their dealings in corporate shares of stock and other investments.<sup>8</sup>

*American enactments.* Like enactments have been passed in many of the United States,<sup>9</sup> in some of which a married woman may make contracts for necessities to be furnished to herself and family, and may sue and be sued thereon, in the same manner as if she were sole,<sup>10</sup> while in a large number of the States the wife's power to trade on her own account has been enlarged and more fully established, so that the profits of her business are secured to her sole and separate use.<sup>11</sup>

1 Married Women's Property Act of 1882; 45, 46 Vict. ch. 75.

2 See 20, 21 Vict. ch. 85, §§ 21, 26; also 21, 22 Vict. ch. 108, §§ 8-10; *Ramsden v. Brearley*, Law R. 10 Q. B. 147.

3 Act of 1870, 33, 34 Vict. ch. 93; *Summers v. City Bank*, Law R. 9 Com. P. 580.

4 Lovell v. Newton, Law R. 4 C. P. D. 7.

5 Ashworth v. Outram, Law R. 5 Ch. D. 923. See Schouler on Husband and Wife, § 308.

6 Compare prior ruling in Pike v. Fitzgibbon, Law R. 17 Ch. D. 454.

7 Previously otherwise: Ex parte Jones, Law R. 12 Ch. D. 484.

8 See 45, 46 Vict. ch. 75; discussed in 17 Am. L. Rev. 555; 22 Am. Law Reg. 761. Construction of Act: See Riddell v. Errington, Law R. 26 Ch. D. 220.

9 See Kelly on Contracts of Married Women, 260-285.

10 See Labaree v. Colby, 99 Mass. 559, 560; Gordon v. Dix, 106 Mass. 305, 306.

11 Schouler on Husband and Wife, § 303. And see §§ 58, 59, on SOLE TRADERS, etc.

§ 58. **Sole traders by custom.**—*Custom of London and its adoption.* By the custom of London, which has been practically adopted in South Carolina,<sup>1</sup> and utilized under legislation in other States, as Maine<sup>2</sup> and Pennsylvania,<sup>3</sup> a wife could be a trader on her own account, and like her husband, could be declared a bankrupt, or subjected to arrest and imprisonment for debt.<sup>4</sup>

*Scope of custom.* She was permitted, with his assent, not only to carry on a trade separate from him, but to assume a personal responsibility on her contracts, and, indeed, to acquire all the rights of a *femme sole* in respect thereto;<sup>5</sup> but it was required that her husband should be made a nominal party in all suits brought by and against her, although the judgment did affect him.<sup>6</sup>

*Restrictions where custom prevails.* But where the custom prevails, the wife must be technically a trader,<sup>7</sup> and the contract must relate to the trade.<sup>8</sup>

1 Diall v. Neuffer, 3 Rich. 78; Hobart v. Lemon, 3 Rich. 121; Wilthaus v. Ludicus, 5 Rich. 326; McGrath v. Robertson, 1 Desaus. 445; Newbiggin v. Pillans, 2 Bay, 162; McDaniel v. Cornwall, 1 Hill, 428; State v. Collins, 1 McCord, 355; McDowell v. Wood, 2 Nott & McC. 242; City Council v. Van Roven, 2 McCord, 465.

2 See Colby v. Lamson, 39 Me. 119; Oxnard v. Swanton, 39 Me. 125.

3 Burke v. Winkle, 2 Serg. & R. 189; Jacobs v. Featherstone, 6 Watts & S. 346.

4 Beard v. Webb, 2 Bos. & P. 97. And see 2 Roper on Husband and Wife, 124; Schouler on Husband and Wife, § 300.

5 See citations in next note.

6 Bacon's Abr. tit. Baron and Feme (M.); Beard v. Webb, 2 Bos. & P. 97; Caudell v. Shaw, 4 Term Rep. 361; Schouler on Husband and Wife, § 300.

7 Ewart v. Nagel, 1 McMull. 50, 51; Robards v. Hutson, 3 McCord, 475; McDaniels v. Cornwell, 1 Hill, 428, 429.

8 McDowell v. Wood, 2 Nott & McC. 242.

## § 59. Separate trading under special enactments.—

*Prevalence of separate trading.* The separate trading of the wife has been authorized by statutory provisions, and even sometimes by private acts,<sup>1</sup> in New York, New Jersey, Maine, New Hampshire, Massachusetts, Connecticut, Iowa, Wisconsin, Kansas, Illinois, Arkansas, California, and other States.<sup>2</sup>

*Effect of enactments.* The effect of these enactments is to enable the wife to act as "free dealer" or "sole trader,"<sup>3</sup> and to use her separate property therefor, and even, in some States, to enter into a general partnership for trade.<sup>4</sup> But the mere fact that a married woman, with the knowledge and consent of the husband, enters into a copartnership, does not make the husband liable for debts of the firm contracted during her membership.<sup>5</sup> In general, what the wife acquires under these statutes is declared to be exempt from liability for her husband's debts, and not subject to his control or interference.<sup>6</sup>

*When acts held inapplicable.* Some of the sole traders' acts have been held inapplicable where the ground of the application is merely the insolvency of the husband,<sup>7</sup> or his temporary inability, through sickness, to support his wife.<sup>8</sup> So under none of the acts relating to *femme sole* traders in Pennsylvania can a married woman be sued for debts which were neither contracted for necessities, nor in the course of her business as a *femme sole* trader.<sup>9</sup> But where a married woman who has applied for and received the benefits of a statute concerning her separate earnings, and has subse-



quently engaged in business under its sanction, does not thereby become a *femme sole* trader,<sup>10</sup> she is liable, nevertheless, upon her contracts made in the prosecution of such business, such as for the services of a bar-keeper, as if she were a *femme sole*.<sup>11</sup>

1 Halladay v. Jones, 57 Ala. 525.

2 Schouler on Husband and Wife, § 309. But this system has been repudiated in North Carolina: McKinnon v. McDonald, 4 Jones Eq. 1.

3 Newbrick v. Dugan, 61 Ala. 251.

4 Schouler on Husband and Wife, § 309.

5 Burgan v. Cahoon, noted 14 Cent. L. J. 259; Sup. Ct. Pa. Nov. 7, 1831.

6 Schouler on Husband and Wife, § 309.

7 Moran v. Moran, 12 Bush, 301.

8 King v. Thompson, 87 Pa. St. 365.

9 Bell v. Ladd, 14 Phila. 168, 169. And see Cleaver v. Sheets, 70 Pa. St. 496. Compare Hubert v. Seymour, 14 Phila. 1, 2.

10 Bovard v. Kittering, 101 Pa. St. 181, 183.

11 Bovard v. Kittering, 101 Pa. St. 181, 184. And may be sued thereon without joining her husband; Bovard v. Kittering, 101 Pa. St. 181, 184.

## CHAPTER V.

### PRICE.

- § 60. In general.
- § 61. Determination where not fixed.
- § 62. Valuation by third person.
- § 63. Reasonable price.
- § 64. Payment in chattels.
- § 65. Payment in negotiable paper.

§ 60. *In general.*—*Essential feature of sale.* The price is an essential ingredient in the contract of sale.<sup>1</sup> In fact, the distinguishing feature of a sale is a price for the goods, or a stipulation by which the price can be fixed.<sup>2</sup> And the price named by the seller must be agreed to by the buyer,<sup>3</sup> though a grumbling assent may be sufficient.<sup>4</sup>

*Money or other equivalent.* Generally speaking, there can be no sale without a price in money.<sup>5</sup> But a sale has been defined as a transfer of property for a valuable consideration ;<sup>6</sup> and it has been pointed out that the price may mean the equivalent or compensation in whatever form received, for property sold.<sup>7</sup>

*Mode of payment.* And some of the cases declare that if property is taken at a fixed money price, the transfer amounts to a sale, whether the price is paid in cash or in goods.<sup>8</sup> So the negotiable representatives of money, as bills and notes, etc., may be taken as the payment of the price.<sup>9</sup>

*Real and fixed or ascertainable.* The price must be real, and not merely nominal ;<sup>10</sup> and it must be fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties ;<sup>11</sup> nor when the price is to be sub-

sequently fixed by means agreed upon, is there a perfect sale or delivery until the price is so fixed.<sup>12</sup>

*Sufficiency of consideration.* The liability of the buyer of a chattel as surety on the seller's note, or the discharge of a debt due from the seller to the buyer, is a sufficient consideration for the sale of such chattel.<sup>13</sup>

*Evidence of value.* Evidence is competent which tends to prove that the property is worth the price charged in an open account upon which suit is brought.<sup>14</sup>

*Inadequacy of price.* A sale or other contract will not be disturbed even in equity<sup>15</sup> for mere inadequacy of price, unless the price obtained is so grossly inadequate as to amount to a fraud or imposition.<sup>16</sup>

1 2 Kent Com. 477. And see *Kleinpeter v. Harrison*, 21 La. An. 196, 197; *Fuller v. Bean*, 34 N. H. 290, 304; *Flagg v. Mann*, 2 Sum. 436, 539.

2 See *Schenck v. Saunders*, 13 Gray, 37, 41.

3 See *Gardner v. Lane*, 12 Allen, 39, 43.

4 *Joyce v. Swann*, 17 Com. B. N. S. 84, 101, 103.

5 See *Wolf v. Wolf*, 12 La. An. 529; and definitions in § 1. There must be money paid or promised: See *Williamson v. Berry*, 8 How. 495, 544. Price is the consideration in money given for the purchase of a thing: 2 Bouvier Law Dict. (15th ed.) 457.

6 2 Kent Com. 468. And see *Howard v. Harris*, 8 Allen, 296, 299. See § 4, on CONSIDERATION.

7 *Hudson Iron Co. v. Alger*, 54 N. Y. 173, 177.

8 *Picard v. McCormick*, 11 Mich. 68, 77. And see § 11, on SALE OR EXCHANGE.

9 See *Bonnell v. Chamberlain*, 26 Conn. 487, 492; *Wallace v. Agry*, 4 Mason, 336, 342. And consult chapter on PAYMENT.

10 2 Kent Com. 477. And see 2 Bouvier Law Dict. (15th ed.) 457.

11 2 Kent Com. 477. And see *Brown v. Bellows*, 4 Pick. 179, 189; *Cunningham v. Ashbrook*, 20 Mo. 553, 559.

12 *Hutton v. Moore*, 26 Ark. 382, 394. And see *Wittkowsky v. Wasson*, 71 N. C. 451, 456.

13 *Fletcher v. Howard*, 2 Aiken, 115; 16 Am. Dec. 686, 687.

14 *Hillebrand v. Wittkemper*, 79 Ind. 180, 182. Price and value discussed: *Kountz v. Kirkpatrick*, 72 Pa. St. 376, 386. And see *Norton v. Willis*, 73 Me. 580, 581; *Fry v. Tilton*, 11 Neb. 456, 459.

15 See 2 Kent Com. 477, n.

16 See *Carman v. Page*, 6 Jones Eq. 37, 40; *Duncan v. Saunders*, 50 Ill. 475, 476; *Waller v. Cralle*, 8 Mon. B. 8, 14; *Follett v. Rose*, 3 McLean, 332, 335.

§ 61. **Determination where not fixed.**—*Need of specification.* By the civil as well as the common law, the specification of a price is necessary to constitute a sale.<sup>1</sup> And it is laid down by some authorities that where a contract is executory and not executed, it is incomplete and not binding on the purchaser, unless the price is fixed distinctly according to some standard, either of amount, or of market, or of reasonableness, or some other method of ascertainment.<sup>2</sup> But there need not be an express assent to the price named by the seller, if it is adopted by the buyer, even under protest.<sup>3</sup>

*Price ascertainable from contract.* And a contract of sale is not invalid, at least under the common law, because it does not in terms fix the price, if it furnishes a criterion for determining the same, leaving nothing in relation thereto for further negotiation between the parties;<sup>4</sup> as where the amount of the price is dependent on the exercise of an option by the buyer, and the time for its exercise is not limited by the contract.<sup>5</sup>

*Something remaining to be done.* But if anything remains to be done as between the parties themselves, for the purpose of ascertaining the price, such as weighing or measuring the goods, it is a current doctrine that the title does not pass,<sup>6</sup> although the subject-matter of the contract is placed in the possession of the buyer.<sup>7</sup> So where the price is based on an inventory to be corrected, it has been held that the title does not pass until after the inventory is verified as stipulated.<sup>8</sup>

*Failure of parties to agree upon.* And there cannot be an executed sale, so as to pass the property, where the price is to be fixed by agreement between the parties afterwards, and they do not subsequently agree thereon.<sup>9</sup>

*Additional act requisite.* Yet the price is sufficiently settled where the terms are so fixed that the sum to be paid can be ascertained by weighing, without further

reference to the parties themselves.<sup>10</sup> And there is a perfect ascertainment of the price by measurement of timber trees, despite an omission to add up the contents of the separate trees.<sup>11</sup>

1 Scott v. Wells, 6 Watts & S. 357, 366. And see Flagg v. Mann, 2 Sum. 486, 539; Kleinpeter v. Harrison, 21 La. An. 196, 157; Bigley v. Risher, 63 Pa. St. 152, 155.

2 See James v. Muir, 33 Mich. 223, 227.

3 Joyce v. Swann, 17 Com. B. N. S. 84, 101.

4 McConnell v. Hughes, 29 Wis. 537, 540. And see Cunningham v. Ashbrook, 20 Mo. 553; Valpy v. Gibson, 4 Com. B. 837, 864; James v. Muir, 33 Mich. 223, 227.

5 McConnell v. Hughes, 29 Wis. 537, 540. Price varying with value of gold: Ames v. Quimby, 96 U. S. 324.

6 See Fuller v. Bean, 34 N. H. 290, 302.

7 See Andrews v. Dieterich, 14 Wend. 31, 35; Ward v. Shaw, 7 Wend. 404; Rourke v. Bullens, 8 Gray, 549. And compare Davis v. Hill, 3 N. H. 382; Simmons v. Swift, 5 Barn. & C. 857, 863; Langdell's Cases on Sales, 659; Devane v. Fennell, 2 Ired. 36, 37.

8 Sherwin v. Mudge, 127 Mass. 547.

9 Wittkowsky v. Wasson, 71 N. C. 451, 456.

10 Cunningham v. Ashbrook, 20 Mo. 553, 559.

11 Tansley v. Turner, 2 Scott, 238, 241.

## § 62. Valuation by third person.—*Decision effective.*

The price may be left to the decision of some third person, as an arbitrator, referee, or other appraiser;<sup>1</sup> since under the rule that the price must be certain, it is sufficient if the price can be made certain;<sup>2</sup> and if such third person fix the price, the sale should be carried into effect.<sup>3</sup>

*No sale until valuation made.* But until the price is so fixed by the means agreed upon, there is no such contract as amounts to a perfect sale or delivery.<sup>4</sup> And if one of the parties obstructs the valuation, as by refusing to allow the valuer appointed by him to proceed with the valuation, there is no contract which can be specifically enforced;<sup>5</sup> though when the valuers named by the parties have not agreed upon the value, but the subject of the negotiation has been consumed by the prospective purchaser, so that a valuation is impossible,

he is liable for the reasonable worth of the things so consumed.<sup>6</sup>

*Estimate binding.* On a sale and delivery of lumber, where it is a part of the agreement between the parties that the quantity and quality shall be estimated by a third person named, his estimate is binding, unless impeached for fraud or mistake.<sup>7</sup> And when a party sold a quantity of hay to another, to be paid for at an agreed price per ton, in a particular mode, when the quantity should be ascertained by persons they might choose, and persons were selected and the amount determined and reported by them, it was held that at law a mistake in their estimate could not be shown, though their determination might be questioned for fraud.<sup>8</sup>

1 See *Brown v. Bellows*, 4 Pick. 179, 189; *Fuller v. Bean*, 34 N. H. 290; *Hutton v. Moore*, 26 Ark. 382.

2 See *Fuller v. Bean*, 34 N. H. 290, 304; *Brown v. Bellows*, 4 Pick. 179, 189; 2 *Bouvier Law Dict.* (15th ed.) 457; *Wittkowsky v. Wasson*, 71 N. C. 451, 456.

3 *Brown v. Bellows*, 4 Pick. 179, 189.

4 *Hutton v. Moore*, 26 Ark. 382, 394. And see *Fuller v. Bean*, 34 N. H. 290, 304.

5 *Vickers v. Vickers*, Law R. 4 Eq. 529, 535, 536. But compare, *contra*, *Humaston v. Telegraph Co.* 20 Wall. 20, 28; *Smyth v. Craig*, 3 Watts & S. 14, 20.

6 *Clarke v. Westrope*, 18 Com. B. 765, 785. See *Wittkowsky v. Wasson*, 71 N. C. 451, 456.

7 *Scott v. Whitney*, 41 Wis. 504, 506. And see *Easterlie v. Rylander*, 59 Ga. 202.

8 *Newlan v. Dunham*, 60 Ill. 233, 235.

§ 63. **Reasonable price.** — *Where no price fixed.* A contract for the sale of a commodity, in which the price is left uncertain, as from the silence of the parties, is, in law, a contract for what the goods shall be found to be reasonably worth.<sup>1</sup> Hence, when goods are accepted, and nothing has been said about the price, a reasonable price has been recognized as correct.<sup>2</sup>

*Market price.* And where one party requested another, when he got ready to shell his corn, to haul it

to his warehouse, and the former would make it satisfactory as to price, and the corn was hauled and delivered at the warehouse, it was held that the law implies a contract to pay the market price at the time and place of delivery, for which a recovery may be had.<sup>3</sup> But it has been substantially laid down that where a contract is implied at a reasonable price, this means such a price as the jury, upon the trial of the cause, shall, under all the circumstances, decide to be reasonable,<sup>4</sup> and not in all cases the current price of the commodity at the time and place of delivery.<sup>5</sup>

*By agreement.* By the common law, the price is fixed within the meaning of the rule requiring it to be settled before there is a sale, even when it appears that the parties have agreed that it should be the reasonable worth of the thing sold.<sup>6</sup> And on a delivery of articles in consideration of being paid what they are worth, which constitutes a sale, the amount recoverable is what the articles were worth at the time of the sale, without regard to their subsequent value.<sup>7</sup>

*Not where special contract.* It has been held that where an article is sold and delivered under a special contract, in which the price is fixed by the parties, that price must govern, and the existence of a conflict in the evidence as to what the price was, does not authorize the jury to allow what the article was reasonably worth.<sup>8</sup>

1 Hoadley v. M'Laine, 10 Bing. 482, 487. And see 2 Blackst. Com. 443, 445; Joyce v. Swann, 7 Com. B. N. S. 84, 104. But compare Acebal v. Levey, 10 Bing. 376, 384; James v. Muir, 33 Mich. 223, 227.

2 James v. Muir, 33 Mich. 223, 227.

3 McEwen v. Morey, 69 Ill. 32, 35. And compare Fenton v. Braden, 2 Cranch C. C. 550, 551.

4 Acebal v. Levy, 10 Bing. 376, 383.

5 Acebal v. Levy, 10 Bing. 376, 383. And see James v. Muir, 33 Mich. 223, 227; Kountz v. Kirkpatrick, 72 Pa. St. 376, 386.

6 Cunningham v. Ashbrook, 20 Mo. 553, 559. Leaving it to the courts to ascertain the amount, if the parties cannot agree upon it themselves: Cunningham v. Ashbrook, 20 Mo. 553, 559. And see Wittkowsky v. Wasson, 71 N. C. 451, 456.

7 *Hill v. Hill*, Coxe, 261; 1 Am. Dec. 206. And see 2 Bouvier Law Dict. (15th ed.) 457.

8 *Illinois Linen Co. v. Hough*, 91 Ill. 63, 65. But the jury must find what the contract price really was from the evidence, according to its weight and credibility: *Illinois Linen Co. v. Hough*, 91 Ill. 63, 64.

§ 64. **Payment in chattels.**—*Covenant or debt as remedy.* In general, when the obligation is to pay money in a fixed quantity of some other article, the authorities all seem to agree that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver the article,<sup>1</sup> and that covenant is the proper remedy.<sup>2</sup>

*Debt as remedy.* But when the obligation is to pay a sum of money in some other article, of which the quantity is not fixed, the weight of authority is that debt is the proper remedy,<sup>3</sup> though in some of the States covenant is held maintainable.<sup>4</sup>

*Optional or otherwise.* And where a party to a negotiable instrument, or other alleged contract, has neglected to exercise an option to pay in specific chattels, an action is maintainable for the money agreed to be paid.<sup>5</sup> But where the unfulfilled promise is to deliver the specific property at all events, the correct rule is that the party so failing to carry out the contract is liable in damages for the value of the property.<sup>6</sup>

1 *Butcher v. Carlisle*, 12 Gratt. 520, 522.

2 *Beirne v. Dunlap*, 8 Leigh, 514; *Butcher v. Carlisle*, 12 Gratt. 520, 522. And see *Weiss v. Manch Chunk etc. Co.* 53 Pa. St. 295, 301.

3 See *Bollinger v. Thurston*, 2 Const. S. C. 447; *Bloomfield v. Hancock*, 1 Yerg. 101; *Young v. Hawkins*, 4 Yerg. 171; *Henry v. Gamble*, Minor, 15; *Bradford v. Stewart*, Minor, 44; *Beirne v. Dunlap*, 8 Leigh, 514.

4 See *Watson v. McNairy*, 1 Bibb, 356; *Bruner v. Kelsoe*, 1 Bibb, 487; *Mattox v. Craig*, 2 Bibb, 584; *Noe v. Preston*, 5 Marsh. J. J. 57; *Jeffrey v. Underwood*, 1 Pike, 508. Consult *Butcher v. Carlisle*, 12 Gratt. 520, 522.

5 *Cummings v. Dudley*, 60 Cal. 383, 385. And see *Roberts v. Beatty*, 2 Pa. 63; 21 Am. Dec. 424, n.

6 *Cummings v. Dudley*, 60 Cal. 383, 386. And see 3 Parsons on Contracts, 315; *Pinney v. Gleason*, 5 Wend. 393; 21 Am. Dec. 223. Compare *White v. Tompkins*, 52 Pa. St. 363, 365, 367.



§ 65. **Payment in negotiable paper.**—*Prima facie conditional.* It is the rule of the common law, adopted in many of the States, that a promissory note or bill of exchange is *prima facie* a conditional payment only.<sup>1</sup>

*Prima facie absolute.* But in several of the States, the contrary doctrine obtains,<sup>2</sup> and the taking a negotiable promissory note or bill of exchange is *prima facie* to be deemed an absolute payment,<sup>3</sup> though this presumption may be rebutted by proof of a different intention;<sup>4</sup> and it is said to be a question of fact, on the evidence, whether the promissory note given on the one hand and accepted on the other, was in satisfaction and discharge of the original debt or not.<sup>5</sup>

1 *Wallace v. Agry*, 4 Mason, 336, 343. And see *Bonnell v. Chamberlin*, 26 Conn. 487, 492; *Van Ostrand v. Reed*, 1 Wend. 424, 431.

2 See *Wallace v. Agry*, 4 Mason, 336, 342; 2 Daniel on Negotiable Instruments, § 1260.

3 *Reed v. Upton*, 10 Pick. 522, 525; *Ward v. Bourne*, 56 Me. 161, 165. And see *Wait v. Brewster*, 31 Vt. 516, 527; *Chapman v. Durant*, 10 Mass. 47, 51, n.; *Costar v. Davies*, 8 Ark. 213, 217.

4 *Reed v. Upton*, 10 Pick. 522, 525. And see *Wallace v. Agry*, 4 Mason, 336, 342; *Melledge v. Boston Iron Company*, 5 Cush. 158, 169.

5 *Melledge v. Boston Iron Co.* 5 Cush. 158, 170. Subject further discussed: 2 Daniel on Negotiable Instruments, §§ 1261-1271.



# CHAPTER VI.

## THING SOLD.

- § 66. In general.
- § 67. Privilege.
- § 68. Existence.
- § 69. After acquired property.

§ 66. In general. — *As requisite of sale.* One of the essential elements of that species of contract called a sale is a thing sold, or subject of transfer.<sup>1</sup>

*Capability of severance from realty.* And property may be sold as personalty, though it is part of the real estate, if it is capable of severance therefrom.<sup>2</sup>

*What may not be sold.* But no property belonging to the United States can be disposed of,<sup>3</sup> except by the authority of an act of Congress.<sup>4</sup> So no one can sell a fund in court as such, as he can make no delivery thereof, but he can sell only his interest when it may be adjusted.<sup>5</sup> And a sale or transfer by one corporation of all its property to another corporation organized out of it, without paying all the debts of the former corporation, will not be permitted in equity, but will be treated as fraudulent and void as to all creditors of the former corporation not assenting thereto.<sup>6</sup>

*Property included in sale.* A contract to deliver the entire crop of cotton which a party might make during a designated year, estimated at a specified number of bales, is properly construed as covering whatever quantity may be produced, and not the number of bales mentioned in the contract.<sup>7</sup> So a contract to purchase hotel furniture has been held to include a piano kept in the parlor for the use of guests.<sup>8</sup> And a description of walnut trees in an agreement to sell them

has been held sufficiently definite to admit parol proof, fixing the identity of the property to be transferred.<sup>9</sup>

1 See 2 Kent Com. 468 ; § 3, on ELEMENTS OF CONTRACT.

2 Folsom v. Moore, 19 Me. 252, 254. And see Upson v. Holmes, 51 Conn. 500, 503 ; Dunkart v. Rineheart, 89 N. C. 354, 358. But compare Dudley v. Foote, 18 The Reporter, 631 ; Sup. Ct. N. H. Aug. 28, 1884 ; Cady v. Sanford, 53 Vt. 632, 636.

3 Under U. S. Const. art. iv. § 3.

4 U. S. v. Nicoll, 1 Paine, 646.

5 McCain v. Portis, 42 Ark. 402, 405. And in the adjustment all parties must contemplate that it will be subject to all claims properly brought to the notice of the court, as an attorney's lien for his fee for services rendered in reference to the fund ; McCain v. Portis, 42 Ark. 402, 405.

6 Hibernia Ins. Co. v. St. Louis etc. Transf. Co. 4 McCrary, 432, 435, 436 ; 13 Fed. Rep. 516 ; 14 The Reporter, 610.

7 See Bell v. Real Estate Banking Co. 3 Ala. 77, 81.

8 Crossman v. Baldwin, 49 Conn. 490 ; 16 The Reporter, 107.

9 Dunkart v. Rineheart, 89 N. C. 354, 357 ; 18 The Reporter, 56.

§ 67. *Privilege.*—*As subject of sale or assignment.* A mere privilege may be the subject of sale or assignment, if the purchaser is willing to run the risk of failing to enjoy it.<sup>1</sup>

*Illustrations.* Thus, there may be a sale or similar transfer of the route of a newspaper carrier,<sup>2</sup> of the good will of a business,<sup>3</sup> of a ferry franchise,<sup>4</sup> of a lease of premises,<sup>5</sup> of a seat in a commercial board or exchange,<sup>6</sup> of a license to manufacture patented machines,<sup>7</sup> of a secret process of manufacture,<sup>8</sup> of a copyright to print and sell a manuscript,<sup>9</sup> and of a trade-mark to be used in connection with the business in which it has become established.<sup>10</sup>

*Newspaper property.* But it has been held that a newspaper subscription list is not the subject of separate ownership, but is a mere accessory, which passes on a sale of the types, presses, etc.<sup>11</sup>

1 Hathaway v. Bennett, 10 N. Y. 108, 112 ; 61 Am. Dec. 739, 742. And see Barber v. Conn. Mut. Life Ins. Co. 15 Fed. Rep. 312, 313, and other cases next cited. Grant of mining privilege : Johnston v. Cowan, 59 Pa. St. 275, 280. Knowledge of locality of oil spring : Reed v. Gorden, 28 Kan. 632 ; 42 Am. Rep. 180.

2 *Hathaway v. Bennett*, 10 N. Y. 103; 61 Am. Dec. 739. But the sale of such route by one carrier to another, gives the purchaser no right to maintain an action against the proprietor for refusing to furnish him with papers for the purchased route, despite various acts of recognition of the carrier by the proprietor: *Hathaway v. Bennett*, 10 N. Y. 103. See, also, *Senter v. Davis*, 33 Cal. 450; *Fallon v. Chronicle Pub. Co.* 1 McAr. 485.

3 *Barber v. Conn. Mut. Life Ins. Co.* 15 Fed. Rep. 312, n. 315; *Herefort v. Cramer*, 7 Colo. 483; 15 The Reporter, 581, 582; *Wallingford v. Burr*, 17 Neb. 137, 138, 139. And see *Bergamini v. Bastian*, 35 La. An. 60; 48 Am. Rep. 216, n. 223. Good will also discussed: 19 Cent. L. J. 362; 14 Am. Law Reg. N. S. 1, 329, 649, 713.

4 See *Montgomery v. Multnomah County*, 11 Or. 344, 352; 3 Pac. Rep. 435, 440.

5 See *Tweed v. Mills*, Law R. 1 Com. P. 39; *McGuire v. Wright*, 18 W. Va. 507.

6 *Clute v. Loveland*, 9 Pacif. Rep. 133, n. 138; Sup. Ct. Cal. Dec. 23, 1885. And see *Allen v. Wotherspun*, 50 N. Y. Super. Ct. 417. Subject discussed: 20 Cent. L. J. 444.

7 Compare *Brooks v. Byam*, 2 Story, 525; *Tabor v. Peters*, 74 Ala. 96, 97; 49 Am. Rep. 804, 806; *Buss v. Putney*, 38 N. H. 74.

8 *Vickery v. Welch*, 19 Pick. 523, 525. And see *Peabody v. Norfolk*, 98 Mass. 452, 457, 460.

9 See 2 Blackst. Com. 405; *Drone Copyright*, 301, 342.

10 *Warren v. Warren Thread Co.* 134 Mass. 247, 248; *Burton v. Stratton*, 12 Fed. Rep. 696, n. 704. And see *Pepper v. Labrot*, 8 Fed. Rep. 29; 12 The Reporter, 321.

11 *McFarland v. Stewart*, 2 Watts, 111; 26 Am. Dec. 109, 110. And see *Holden v. McMakin*, 1 Pars. Sel. Cas. 280, 301. Compare *Porter v. Gorman*, 65 Ga. 11, 14. Newspaper establishment held subject of property, to be protected by law: *Snowden v. Noah*, 1 Hopk. Ch. 347; 14 Am. Dec. 517, 518.

§ 68. **Existence.**—*Thing no longer in existence, etc.* A contract of sale contemplates an existing thing as the subject of transfer.<sup>1</sup> And there can be no sale if the thing intended to be sold turn out not to have been in existence at the time the contract was made;<sup>2</sup> as where it had previously perished or been destroyed without the knowledge of the parties.<sup>3</sup> So there can be no sale if the thing sold had been transferred to a third party.<sup>4</sup>

*Thing not yet in existence.* A hope or expectation of means, founded on a right in being, may be the subject of a sale, because in such cases there is a potential existence;<sup>5</sup> and this principle applies to the product or increase of that which is in existence.<sup>6</sup> Thus, a man

may sell the wool to grow upon his own sheep,<sup>7</sup> or the crops to grow upon his own land,<sup>8</sup> or the milk that a cow may yield during the coming year,<sup>9</sup> or the unborn progeny of an animal.<sup>10</sup> So he may assign his future earnings arising out of a contract of service.<sup>11</sup> And in general, he may make a transfer of anything which amounts to a possibility coupled with an interest, as his right therein is vested, though contingent and liable to be defeated.<sup>12</sup>

*Mere possibility.* But a mere possibility or contingency, not founded upon a right or coupled with an interest, cannot be the subject of a sale,<sup>13</sup> or rather, cannot be the subject of a present sale, though it may be of an executory agreement to sell.<sup>14</sup> And this principle applies to a transfer of accounts to be created,<sup>15</sup> or of fish hereafter to be caught in the sea,<sup>16</sup> and to an assignment of future wages to be earned under a contract not existing at the time.<sup>17</sup> For there can be no immediate transfer of the title to a thing which has neither an actual nor a potential existence.<sup>18</sup> And hence an expectation dependent on a chance like a hope of succession cannot be sold.<sup>19</sup>

1 See *Couturier v. Hastie*, 5 H. L. Cas. 673, 681; 2 Kent Com. 463; 1 Parsons on Contracts, 522.

2 See *Hastie v. Couturier*, 9 Ex. 102; S. C. as *Couturier v. Hastie*, 5 H. L. Cas. 673; *Allen v. Hammond*, 11 Peters, 63, 70; *Gibson v. Pelkie*, 37 Mich. 380, 381.

3 2 Kent Com. 468, 469. And see *Franklin v. Long*, 7 Gill & J. 407, 420; *Thompson v. Gould*, 20 Pick. 134, 139; *Gardner v. Lane*, 9 Allen, 492, 499; *Howell v. Coupland*, Law R. 9 Q. B. 462, 465; *Dexter v. Norton*, 47 N. Y. 62; *Kelly v. Bliss*, 54 Wis. 187.

4 *Couturier v. Hastie*, 5 H. L. Cas. 673.

5 *Wheeler v. Wheeler*, 2 Met. (Ky.) 474. And see 2 Kent Com. 468.

6 *Van Hoozer v. Cory*, 34 Barb. 9, 12.

7 See *Low v. Pew*, 108 Mass. 347, 350; 11 Am. Rep. 357, 359; *Jones v. Richardson*, 10 Met. 481, 488.

8 *Andrew v. Newcomb*, 32 N. Y. 417, 421. And see *Bellows v. Wells*, 36 Vt. 599; *Sanborn v. Benedict*, 78 Ill. 309; *Lewis v. Lyman*, 22 Pick. 437, 442, 443.

9 *Van Hoozer v. Cory*, 34 Barb. 9, 13.

10 *Hull v. Hull*, 48 Conn. 250, 256; 40 Am. Rep. 165, 166; *Fonville v. Casey*, 1 Murph. 389; *M'Carty v. Blevins*, 5 Yerg. 195. See 1 Parsons on Contracts, 523, n.; *Allen v. Delano*, 55 Me. 113, 114; *Sawyer v. Gerish*, 70 Me. 254, 255; 35 Am. Rep. 323, 324.

11 *Hartley v. Tapley*, 2 Gray, 565. See *Low v. Pew*, 108 Mass. 347, 350; 11 Am. Rep. 357, 359; distinguishing *Mulhall v. Quinn*, 1 Gray, 105.

12 See *Low v. Pew*, 108 Mass. 347, 350; 11 Am. Rep. 357, 359; *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Heald v. Builders' Ins. Co.* 111 Mass. 38, 40.

13 *Wheeler v. Wheeler*, 2 Met. (Ky.) 474. And see *Low v. Pew*, 108 Mass. 347, 350; 11 Am. Rep. 357, 359; *Skipper v. Stokes*, 42 Ala. 255, 258; *Thrall v. Hill*, 110 Mass. 328, 330.

14 See *Purcell v. Mather*, 35 Ala. 570, 573; 2 Kent Com. 468. Executory agreement: See § 9.

15 *Skipper v. Stokes*, 42 Ala. 255, 258. And see *Purcell v. Mather*, 35 Ala. 579.

16 *Low v. Pew*, 107 Mass. 347; 11 Am. Rep. 367; distinguishing *Gardner v. Hoeg*, 13 Pick. 163, and *Tripp v. Bunnell*, 12 Cush. 376.

17 *Herbert v. Bronson*, 125 Mass. 475, 476. And see *Mulhall v. Quinn*, 1 Gray, 105; *Hartley v. Tapley*, 2 Gray, 565; *Twiss v. Cheever*, 2 Allen, 40.

18 See *Rice v. Stone*, 1 Allen, 566, 569; 2 Kent Com. 468; *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711, 712; *Hamilton v. Rogers*, 6 Md. 301, 315. And compare *Clemens v. Davis*, 7 Pa. St. 263, 264; *Payne v. Lassiter*, 10 Yerg. 507, 512; *Cooper v. Bumpass*, 1 Tex. Ct. App. (Civ. Cas.) § 499.

19 2 Kent Com. 468. And see *Hitchcock v. Giddings*, 4 Price, 135, 140; *Low v. Pew*, 108 Mass. 347, 350; 11 Am. Rep. 357, 359; *Wheeler v. Wheeler*, 2 Met. (Ky.) 474. Compare *Hanks v. Pulling*, 6 El. & B. 659, 669. Otherwise in equity; *Stover v. Eycleshimer*, 4 Abb. N. Y. App. 309, 312; *Powers' Appeal*, 63 Pa. St. 443, 444, 445. And see *Mastin v. Marlow*, 65 N. C. 595, 703. Evidence as to alleged chance of getting machinery: *Stafford v. Henry*, 51 Pa. St. 514, 517.

§ 69. *After acquired property.—Agreement to sell property not then owned.* There may be an agreement to sell all and every species of personal property not prohibited by law, whether the vendor owns it at the time or not.<sup>1</sup> And although the subject-matter of the agreement has neither an actual nor potential existence,<sup>2</sup> such an agreement is usually denominated an executory contract,<sup>3</sup> and for its violation the remedy of the party is by an action to recover damages.<sup>4</sup>

*Sale of vested interest.* Furthermore, where a party has a vested interest in chattels, which will ripen into a perfect title by lapse of time, a valid sale of his interest may be made by such party.<sup>5</sup>

*Vesting of title subsequently acquired.* And some of the cases declare that if one sells goods in which he has no property at the time of sale, and subsequently acquire a title, the property in the goods will vest in the buyer as soon as a title is acquired by the seller.<sup>6</sup>

*Confirmatory act.* But other cases dealing with these and like transfers, lay down the law as well settled, that a grant of goods which at the time thereof do not belong to the grantor is void;<sup>7</sup> though after the grantee has acquired a title to the goods, the grant may be made effectual to pass the property by a new act,<sup>8</sup> done by the grantor for the avowed object and with the view of carrying the former disposition into effect.<sup>9</sup>

*Present transfer of future acquisitions.* In general, however, and under the common-law doctrine, the sale or other transfer of chattels or other property to be thereafter acquired, is deemed invalid as a conveyance of present operation.<sup>10</sup>

*Rule in equity.* But the rule in equity<sup>11</sup> is that if a party agrees to transfer either absolutely or by way of security, personal or real property of which he is not possessed at the time, and receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, the court will compel him to perform the contract;<sup>12</sup> and the beneficial interest would pass to the purchaser or mortgagee immediately on the property being acquired,<sup>13</sup> provided the property is so definitely described that it can be identified.<sup>14</sup>

1 *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711, 713. And see *Hibblewhite v. M'Morine*, 5 Mees. & W. 462; *Mortimer v. M'Callan*, 6 Mees. & W. 58, 70; 7 Mees. & W. 20, 47.

2 Compare *Calkins v. Lockwood*, 16 Conn. 276, 285.

3 See § 9, on EXECUTORY AGREEMENT.

4 *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711, 713.

5 *Thrall v. Hill*, 110 Mass. 328, 330.

6 *Frazer v. Hilliard*, 2 Strob. 309, 317. And see *Blackmore v. Shelby*, 8 Humph. 439, 441. Compare *Hotchkiss v. Oliver*, 5 Denio, 314, 319.

7 *Head v. Goodwin*, 37 Me. 181, 187. The common law recognizes transfers of chattels when they are the produce of land or of chattels already owned by the transferrer, but not of future chattels *simpliciter*: *Brett v. Carter*, 2 Low. 453, 461.

8 *Head v. Goodwin*, 37 Me. 181, 187. There must be *novus actus interveniens* after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old: *Brett v. Carter*, 2 Low. 453, 461.

9 *Lunn v. Thornton*, 1 Com. B. 379, 387. And see *Jones v. Richardson*, 10 Met. 481; *Moody v. Wright*, 13 Met. 17, 30, 31; *Abraham v. Carter*, 53 Ala. 8, 10.

10 See *Gale v. Burnell*, 7 Q. B. 850, 863; *Lunn v. Thornton*, 1 Com. B. 379, 387; *Head v. Goodwin*, 37 Me. 181, 187; *Brett v. Carter*, 2 Low. 453, 467; *Pierce v. Emery*, 32 N. H. 484, 505; *Moody v. Wright*, 13 Met. 17, 29; *Rice v. Stone*, 1 Allen, 566, 569; *Noyes v. Jenkins*, 55 Ga. 586. But compare *Chidell v. Galsworthy*, 6 Com. B. N. S. 471, 478. Mortgage of future acquisition sustained: *Pierce v. Emery*, 32 N. H. 484; *Henshaw v. Bank*, 10 Gray, 568; *Barnard v. Eaton*, 2 Cush. 294, 303; *Cressy v. Sabre*, 17 Hun, 120, 122; *Pennock v. Coe*, 23 How. 117, 128; *Watkins v. Wyatt*, 9 Bart. 250; 30 Am. Rep. 63; *Parker v. Jacobs*, 14 S. C. 112; 37 Am. Rep. 724; *Dupree v. McClanahan*, 1 Tex. Ct. App. (Civ. Cas.) 22 594, 595. And see *Brett v. Carter*, 2 Low. 453, 462, 463; *Codman v. Freeman*, 3 Cush. 306, 309; *Sawyer v. Gerrish*, 70 Me. 254; 35 Am. Rep. 323. Such mortgage not sustained: *Phelps v. Murray*, 2 Tenn. Ch. 746; *Griffith v. Douglass*, 73 Me. 432; 40 Am. Rep. 395. Compare *Winslow v. Merch. Ins. Co.* 4 Met. 306. Subject discussed: 6 South. L. Rev. N. S. 221. Regulation by statute as to liens in crops: See *Jarrett v. McDaniel*, 32 Ark. 598; *Abraham v. Carter*, 53 Ala. 8, 10; *Stephens v. Tucker*, 55 Ga. 543, 544.

11 See generally, *Abraham v. Carter*, 53 Ala. 8, 10.

12 *Holroyd v. Marshall*, 10 H. L. Cas. 191, 211. Assuming that the contract is one of that class of which the court would decree the specific performance: *Holroyd v. Marshall*, 10 H. L. Cas. 191, 211.

13 *Holroyd v. Marshall*, 10 H. L. Cas. 191, 211. And see generally *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170.

14 See *Belding v. Read*, 3 Hurl. & C. 955; *Brett v. Carter*, 2 Low. 453, 461; *Lazarus v. Andrade*, Law R. 5 C. P. D. 318. Compare *Beall v. White*, 94 U. S. 382, 387.



## CHAPTER VII.

## EXECUTORY SALES.

- § 70. In general.
- § 71. Intention to transfer title.
- § 72. Difficulty in determining intention.
- § 73. Passing of title and risk.
- § 74. Something to be done.

§ 70. *In general.*—*Present transfer of title in bargain and sale.*—At common law, the mutual assent of the parties binds the contract, which is deemed a bargain and sale, if the property by the terms of the agreement passes immediately to the buyer;<sup>1</sup> and in such a transaction the transfer of title is effected the moment the contract is concluded, regardless of delivery or retention of possession.<sup>2</sup>

*Executory agreement, where postponement of transfer of title.* But the contract is regarded as an executory agreement if the property in the thing sold temporarily remains in the seller, and is only to pass to the buyer at a future time, or on certain conditions inconsistent with its immediate transfer;<sup>3</sup> and such buyer cannot hold the goods, although he has advanced money upon them,<sup>4</sup> against a subsequent purchaser from the same vendor, who has obtained a complete title through an executed or absolute sale.<sup>5</sup>

*Contract with right of inspection, etc.* A contract which confers on the party proposing to buy cotton a right to inspect, examine, and reweigh the cotton within a specified time, and on paying or tendering the price within a specified time, to demand a transfer of the ownership and possession, and also confers on the seller a corresponding right to demand such inspection, etc.,

within the prescribed time, is not a sale, but an executory agreement for a sale, and does not pass the title to the cotton.<sup>6</sup>

*Conveyance and contract.* The transaction is, in the technical language of the English law, called a bargain and sale, and the contract is said to be executed when the transfer of property is completed *uno ictu* with the contract itself.<sup>7</sup> But the sale or contract is said to be executory when the transfer is not so completed, and it is meant that there has been no conveyance but only a contract.<sup>8</sup>

*Distinctions in scope and remedies.* In the latter case there is not strictly a sale, but rather a mere promise to sell, or agreement for a future sale,<sup>9</sup> and the party contracting to buy does not, as in the case of a present sale, become the owner of the goods and liable for their loss or destruction;<sup>10</sup> nor can he claim the identical goods or sue for their conversion, but his remedy at common law for a breach of the contract is limited to an action for damages.<sup>11</sup> In the former case the seller parts with his title, but may retain the possession, and even the right of possession,<sup>12</sup> so as to enforce his lien on the goods,<sup>13</sup> and stop them while in transit to the buyer.<sup>14</sup>

*Two senses of executed sale.* An executed or absolute sale should be further distinguished from an executed contract of sale,<sup>15</sup> as the former relates to the formation of the contract, and means a sale, where nothing remains to be done by either party to effect the transfer of title, while the latter relates to the fulfillment of the contract, and signifies that it has been fully performed on both sides by the delivery of the thing sold, and the payment of the price therefor.<sup>16</sup>

1 Hatch v. Oil Co. 100 U. S. 124, 131.

2 See Meyerstein v. Barber, Law R. 2 Com. P. 38, 51; Law R. 4 H. L. 317, 326; Webber v. Davis, 44 Me. 147; Bailey v. Smith, 43 N. H. 143; Dexter v. Norton, 55 Barb. 272; Crill v. Doyle, 53 Cal. 713; Tome v. Dubois, 6 Wall. 543; Lester v. East, 49 Ind. 588, 592.

3 *Hatch v. Oil Co.* 100 U. S. 124, 131. And see *The Elgee Cotton Cases*, 22 Wall. 180, 187; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174; *Strauss v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588, 592; *Olney v. Howe*, 89 Ill. 556; *Cardinell v. Bennett*, 52 Cal. 476.

4 *Dittmar v. Norman*, 118 Mass. 319; *Powder Co. v. Burkhardt*, 97 U. S. 110.

5 *Elliott v. Stoddard*, 98 Mass. 145. Basis of foregoing statements and authorities: *Bennett's Benjamin on Sales*, § 308, and notes; 1 *Corbin's Benjamin on Sales*, § 308, and notes; *Lester v. East*, 49 Ind. 588, 592; *Hatch v. Oil Co.* 100 U. S. 124, 131; *Elgee Cotton Cases*, 22 Wall. 180, 187; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174. Compare *Blackburn on Sales*, 147, 149; *Story on Sales*, §§ 231, 232; *Heilbutt v. Hickson*, Law R. 7 Com. P. 438; 3 Eng. Rep. 328; 2 *Schouler on Personal Property*, § 237. See § 9, on SALE OR EXECUTORY AGREEMENT.

6 *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174. And a written order by the seller to the purchaser, directing delivery to a railroad company of the cotton by a warehouseman with whom it was stored, did not convert the executory bargain into a sale: *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174, 175.

7 See citations in next note.

8 *Campbell on Sales*, 2. And see *Graham's Blackburn on Sales*, 243.

9 See § 9, on SALE OR EXECUTORY AGREEMENT; *Cunningham v. Ashbrook*, 20 Mo. 553, 556; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 174; 2 *Bouvier Law Dict.* (15th ed.) 607.

10 See section on PASSING OF TITLE AND RISK.

11 See 2 *Schouler on Personal Property*, § 238; *Benjamin on Sales*, (Am. eds.) § 308; *Graham's Blackburn on Sales*, Introd. ix.; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 175; *Lester v. East*, 49 Ind. 588, 592.

12 See section on RIGHT OF POSSESSION, under chapter on TRANSFER OF TITLE.

13 See chapter on SELLER'S LIEN.

14 See chapter on STOPPAGE IN TRANSITU.

15 2 *Schouler on Personal Property*, § 237.

16 See *Story on Sales*, § 231; citing, *Fletcher v. Peck*, 6 Cranch, 136. Compare *Smith v. Supervisors*, 44 Wis. 691.

§ 71. *Intention to transfer title.* — *Passing or retention of title.* In a bargain and sale, as before stated,<sup>1</sup> the thing sold becomes the property of the buyer the moment the contract is concluded,<sup>2</sup> regardless of delivery or retention of possession,<sup>3</sup> while in an executory agreement the goods remain the property of the vendor till the contract is executed.<sup>4</sup>

*Intention governs.* Whether a contract is of the one kind or the other, and whether the title to the property passes or not, depends upon the intention<sup>5</sup> of the par-

ties to the agreement,<sup>6</sup> and this design may be so clearly shown, as by expressly reserving the title, that no question can arise concerning it;<sup>7</sup> while the mere fact that something remains to be done to the property will not control as against the unequivocal acts of the parties.<sup>8</sup>

*Manifestation and ascertainment.* Such intention must be manifested at the time the bargain is made, and can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter of the contract.<sup>9</sup>

*Province of court and jury.* This intent must be determined by the jury,<sup>10</sup> unless the evidence will legally justify no other finding;<sup>11</sup> but when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, questions of law are alone presented.<sup>12</sup>

*Further act to be done to goods.* An intention that the title shall not vest in the purchaser is generally shown in the case of specific and ascertained existing chattels, by the fact of some further act being first required to be done, such as delivery or payment of the price, or weighing or measuring in order to ascertain the price, or marking, packing, finishing, etc.<sup>13</sup> In the case of goods not ascertained or existing at the time of the contract, like tests apply as to those goods which have been afterwards selected and appropriated by the seller, and approved and assented to by the buyer.<sup>14</sup>

*Goods ready for delivery, etc.* But in the case of sales, where the property to be sold is in a state ready for delivery, and the payment of money, or giving security therefor, is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected, and the interest passes immediately to

the vendee, although the weight or measure of the articles sold remains yet to be ascertained.<sup>15</sup> And such a case presents a question of the intention of the parties to the contract.<sup>16</sup>

*Meeting of minds.* In general, the owner must intend to part with his property, and the purchaser to become the immediate owner.<sup>17</sup> Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale.<sup>18</sup>

1 See preceding section.

2 *Lester v. East*, 49 Ind. 588, 592.

3 See *Meyerstein v. Barber*, Law R. 2 Com. P. 38; Law R. 4 H. L. 317; *Tome v. Dubois*, 6 Wall. 548; *Webber v. Davis*, 44 Me. 147; *Bailey v. Smith*, 43 N. H. 143; *Dexter v. Norton*, 55 Barb. 272; *Crill v. Doyle*, 53 Cal. 713.

4 *The Elgee Cotton Cases*, 22 Wall. 180, 187; *Leigh v. Mobile & Ohio R. R. Co.* 58 Ala. 165, 174; *Olney v. Howe*, 89 Ill. 556; *Strauss v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588, 592; *Cardinell v. Bennett*, 52 Cal. 476.

5 See *State v. Four Jugs etc.* 2 Atl. Rep. (Vt.) 586, 589.

6 *Me.* — *Stone v. Peacock*, 35 Me. 383; *Bethel Steam Mill Co. v. Brown*, 57 Me. 18; *Dyer v. Libby*, 61 Me. 45. *Vt.* — *Bellows v. Wells*, 36 Vt. 599; *Fitch v. Burk*, 38 Vt. 689. *N. H.* — *Fuller v. Bean*, 34 N. H. 290; *Ockinton v. Rickey*, 41 N. H. 279; *Kelsea v. Haines*, 41 N. H. 246; *Prescott v. Locke*, 51 N. H. 101. *Mass.* — *Sumner v. Hamlet*, 12 Pick. 76; *Macomber v. Parker*, 13 Pick. 182; *Riddle v. Varnum*, 20 Pick. 283; *Jenny v. Williams*, 5 Allen, 3; *Morse v. Sherman*, 106 Mass. 433; *Dugan v. Nichols*, 125 Mass. 33. *Conn.* — *Chapman v. Shepard*, 39 Conn. 413. *N. Y.* — *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706; *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 413; *Hurd v. Cook*, 75 N. Y. 454. *Mo.* — *Cunningham v. Ashbrook*, 20 Mo. 553. *Mich.* — *Wilkinson v. Holiday*, 33 Mich. 386. *Ind.* — *Lester v. East*, 49 Ind. 588. *Fed. Ct.* — *Barrett v. Goddard*, 3 Mason, 113; *Elgee Cotton Cases*, 22 Wall. 180; *Hatch v. Oil Co.* 100 U. S. 124. *Eng.* — *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 612; *Logan v. Le Mesurier*, 11 Moore P. C. C. 116; *Langdell's Cases on Sales*, 681; *Ogg v. Shuter*, Law R. 10 Com. P. 159. *Can.* — *Gleason v. Knapp*, 26 Up. Can. C. P. 553; *Ross v. Ety*, 28 Up. Can. C. P. 316. *N. B.* — *Gibson v. McKean*, 3 Pugs. 299; *Sprague v. King*, 1 Pugs. & B. 24.

7 *Weed v. Boston etc. Ice Co.* 12 Allen, 377.

8 *Sewell v. Eaton*, 6 Wis. 490; *Fletcher v. Ingram*, 46 Wis. 190.

9 *Foster v. Ropes*, 111 Mass. 10, 16. And see *Hatch v. Oil Co.* 100 U. S. 124, 131; *Callaghan v. Myers*, 89 Ill. 556; *Lingham v. Eggleston*, 27 Mich. 324, 326.

10 *Riddle v. Varnum*, 20 Pick. 283; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Marble v. Moore*, 102 Mass. 443; *George v. Stubbs*, 26 Me. 250; *Dyer v. Libby*, 61 Me. 45; *Fuller v. Bean*, 34 N. H. 290; *Kelsea v. Haines*, 41 N. H. 253; *De Kidder v. McKnight*, 13 Johns. 294; *McClurg v. Kelley*, 21 Iowa, 508.

11 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291.

12 *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706. Basis of foregoing statements and authorities: *Bennett's Benjamin on Sales*, § 311 *a*, notes; 1 *Corbin's Benjamin on Sales*, § 309, notes 2, 3; *State v. Four Jugs etc.* 2 Atl. Rep. (Vt.) 586, 589; *Foster v. Ropes*, 111 Mass. 10, 16; *Lingham v. Eggleston*, 27 Mich. 324, 326.

13 *Heilbutt v. Hickson*, Law R. 7 Com. P. 438, 449; 3 Eng. Rep. 328, 337.

14 *Heilbutt v. Hickson*, Law R. 7 Com. P. 438, 449; 3 Eng. Rep. 328, 337.

15 *Riddle v. Varnum*, 20 Pick. 280, 283, 284. And see *Denny v. Williams*, 5 Allen, 3, 4.

16 *Riddle v. Varnum*, 20 Pick. 280, 284. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and that all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the rate agreed upon: *Riddle v. Varnum*, 20 Pick. 280, 284.

17 *Mason v. Thompson*, 18 Pick. 305. It is to be ascertained whether the negotiations and acts of the parties are evincive of an intention on the part of the seller to relinquish all further claim or control as owner, and on the part of the buyer to assume such control with its consequent liabilities: *Bethel Steam Mill Co. v. Brown*, 57 Me. 18.

18 *Mason v. Thompson*, 18 Pick. 305. See *State v. Four Jugs etc.* 2 Atl. Rep. (Vt.) 586, 589. The general rule, where the case is not within the statute of frauds, is that the question is only one of mutual assent, whether the minds of the parties have met and by their understanding the purchaser has now become the owner: *Wilkinson v. Holiday*, 33 Mich. 386, 388.

§ 72. **Difficulty in determining intention.**—*In general.* It is the general rule that the property in goods and chattels passes under the contract of sale according to the intention of the parties;<sup>1</sup> but the difficulty in the application of this rule is in determining under what circumstances the parties shall be considered as having evinced an intention that property in the subject-matter of sale should pass from the vendor to the purchaser.<sup>2</sup>

*Slight circumstances sometimes deemed important.* Of the numerous cases on the subject which are said not to be harmonious, those which have been decided on the peculiar language of the statute of frauds<sup>3</sup> are stated to have held a very stringent rule;<sup>4</sup> and where the rights of unpaid vendors are concerned, courts have laid hold of slight circumstances to retain the property in such vendors until the purchase money be paid.<sup>5</sup>

1 See section on INTENTION TO TRANSFER TITLE.

2 Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 282, 283, 284. And see Elgee Cotton Cases, 22 Wall. 180, 187.

3 Statute of frauds: See subsequent chapter on that subject.

4 Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 282, 284.

5 See case just cited relying upon following decisions: Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639; Wallace v. Breeds, 13 East, 522; Langdell's Cases on Sales, 739; Shepley v. Davis, 2 Maule & S. 397; Langdell's Cases on Sales, 752; Bush v. Davis, 2 Maule & S. 397; Langdell's Cases on Sales, 747; Swanwick v. Sothorn, 9 Ad. & E. 895; Langdell's Cases on Sales, 673; Goots v. Rose, 17 Com. B. 229; Langdell's Cases on Sales, 970.

§ 73. *Passing of title and risk. — Sale of specific ascertained goods as passing title.* By a contract for the sale of specific ascertained goods,<sup>1</sup> the property, by the English law, immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties.<sup>2</sup> So in this country the same well-settled rule governs in regard to the passing of the title, where nothing remains to be done on the part of the seller in the way of ascertaining, appropriating, or delivering the property sold.<sup>3</sup>

*Change of risk.* And since the risk of property which is the subject of a sale usually attends the title,<sup>4</sup> the effect of the transaction is to cast upon the purchaser all future risk, although he cannot take the goods away without paying the price.<sup>5</sup>

*Goods identified but not separated, etc.* Furthermore, the general doctrine applies if the goods are identified, though not separated from others,<sup>6</sup> and the property may pass, although the vendor agrees to do something further in regard to the goods.<sup>7</sup>

1 See Hatch v. Oil Co. 100 U. S. 124, 134.

2 Gilmour v. Supple, 11 Moore P. C. C. 566; Langdell's Cases on Sales, 624. And see Simmons v. Swift, 5 Barn. & C. 360; Langdell's Cases on Sales, 659; Martindale v. Smith, 1 Q. B. 389; Tarling v. Baxter, 6 Barn. & C. 360; Langdell's Cases on Sales, 621; Chenery v. Vial, 5 Hurl. & N. 288; Sweeting v. Turner, Law R. 7 Q. B. 310; Dixon v. Yates, 5 Barn. & Adol. 313; The Calcutta Co. v. De Mattos, 32 Law J. Q. B. 322; Chambers v. Miller, 10 Com. B. N. S. 125; Spartali v. Benecke, 10 Com. B. N. S. 212; Joyce v. Swan, 17 Com. B. N. S. 84; Wood v. Bell, 6 Ll. & B. 355; Langdell's Cases on Sales, 847; Turley

*v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692; *Hinde v. Whitehouse*, 7 East, 588; *Langdell's Cases on Sales*, 102.

3 *Me.*—*Merrill v. Parker*, 24 Me. 89; *Wing v. Clark*, 24 Me. 366; *Waldron v. Chase*, 27 Me. 414; *Means v. Williamson*, 37 Me. 556; *Webber v. Davis*, 44 Me. 147; *Hotchkiss v. Hunt*, 49 Me. 213; *Chase v. Willard*, 57 Me. 157. *N. H.*—*Page v. Carpenter*, 10 N. H. 77; *Felton v. Fuller*, 29 N. H. 121; *Bailey v. Smith*, 43 N. H. 143. *Mass.*—*Rice v. Codman*, 1 Allen, 377; *Gardner v. Lane*, 9 Allen, 493; *Thayer v. Lapham*, 13 Allen, 28; *Warden v. Marshall*, 99 Mass. 305; *Marble v. Moore*, 102 Mass. 443; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295; *Martin v. Adams*, 104 Mass. 262; *Morse v. Sherman*, 106 Mass. 430; *Foster v. Ropes*, 111 Mass. 10; *Haskins v. Warren*, 115 Mass. 553; *Goddard v. Binney*, 115 Mass. 456; *Townsend v. Hargraves*, 118 Mass. 325. *N. Y.*—*Olyphant v. Baker*, 5 Denio, 379; *Langdell's Cases on Sales*, 635; *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706; *Bigler v. Hall*, 54 N. Y. 67. *N. C.*—*Simpson v. Simpson*, 3 Ired. 233; *Jenkins v. Jarrett*, 70 N. C. 255. *S. C.*—*Frazer v. Hilliard*, 2 Strob. 309. *Ky.*—*Willis v. Willis*, 6 Dana, 48; *Crawford v. Smith*, 7 Dana, 59; *Sweeney v. Onsley*, 4 Mon. B. 413; *Buffington v. Ulen*, 7 Bush, 221. *Ohio*—*Hooban v. Bidwell*, 16 Ohio, 506. *Ind.*—*Lester v. East*, 49 Ind. 588. *Colo.*—*Hanauer v. Bartels*, 2 Colo. 514. *Fed. Ct.*—*Barrett v. Goddard*, 3 Mason, 107. And see *Hatch v. Oil Co.* 100 U. S. 124, 134. *Contra*, see *Lehman v. Warren*, 53 Ala. 535.

4 *Taylor v. Lapham*, 13 Allen, 26; *Joyce v. Adams*, 4 Seld. 236; *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 703; *Whitcomb v. Whitney*, 24 Mich. 486; *Smith v. Dalls*, 35 Ind. 235; *Willis v. Willis*, 6 Dana, 49.

5 *Simmons v. Swift*, 5 Barn. & C. 862; *Langdell's Cases on Sales*, 659. And see *Willis v. Willis*, 6 Dana, 43; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Hall v. Richardson*, 16 Md. 383. But see *Currie v. White*, 1 Sweeny, 176.

6 *Ropes v. Lane*, 9 Allen, 502; *Arnold v. Delano*, 4 Cush. 40; 50 Am. Dec. 754, 758. And see *Levasseur v. Cary*, 3 Atl. Rep. (Me.) 431; 22 The Reporter, 304.

7 *Marble v. Moore*, 102 Mass. 443 (alteration of hog); *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706 (delivery at railroad station); *Thorndike v. Bath*, 114 Mass. 116 (finishing piano); *Bethel Steam Mill Co. v. Brown*, 57 Me. 9. And see *Filkins v. Whyland*, 24 N. Y. 341; *Russel v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 418; *Bates v. Coster*, 3 Thomp. & C. 580; *Dyer v. Libby*, 61 Me. 45; *Walden v. Murdock*, 23 Cal. 540; *Cummings v. Griggs*, 2 Duval, 87. Basis of foregoing statements and authorities: *Bennett's Benjamin on Sales*, §§ 315, 317, notes; 1 *Corbin's Benjamin on Sales*, §§ 315, 317, notes; *Hatch v. Oil Co.* 100 U. S. 124; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Levasseur v. Cary*, 3 Atl. Rep. 431; 22 The Reporter, 304; and decisions reported in *Langdell's Cases on Sales* as given.

§ 74. *Something to be done.*—*Presumption in favor of postponing transfer of title.*—Where under a contract for the purchase of personal property, something remains to be done to identify the property, or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong, though by no means conclusive, that by the



understanding of the parties the title was not to pass until such act had been fully done and accomplished.<sup>1</sup>

*Statement of general doctrine.* And the general doctrine on this subject is said undoubtedly to be, that when some act remains to be done in relation to the articles which are the subject of the sale,<sup>2</sup> as that of weighing or measuring,<sup>3</sup> and there is no evidence tending to show the intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to the consummation of the contract,<sup>4</sup> and until it is performed the property does not pass to the vendee.<sup>5</sup>

*Unperformed operation.* More broadly it is laid down as a general principle that where any operation, such as weighing, measuring, counting, or the like, remains to be performed in order to ascertain the price, the quantity, or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed;<sup>6</sup> and the performance thereof is a condition precedent to the passing of the title to the goods.<sup>7</sup>

*Limitations of general doctrine.* But this doctrine applies only where such is the agreement or intention of the parties,<sup>8</sup> and it has been limited to cases where the acts named are necessary to identify the goods,<sup>9</sup> or fit them for delivery,<sup>10</sup> and where such acts are to be done by or for the seller,<sup>11</sup> although it sometimes has been declared that it is indifferent whether the acts remaining to be done to render the sale complete are to be performed by the buyer, or by the seller, or by a third person, and are designed to identify the goods or to determine the price, or to enable the property to pass in conformity to the agreement, as the payment of duties on imported goods, or their transportation to a different place.<sup>12</sup>

1 *Wilkinson v. Holiday*, 33 Mich. 386. And see *Hubler v. Gaston*, 9 Or. 66; 42 Am. Rep. 794, 795; *Hatch v. Oil Co.* 100 U. S. 124, 133.

2 Material act before delivery: See *Darden v. Lovelace*, 52 Ala. 289, 290.

3 See *Stevens v. Eno*, 10 Barb. 95, 96.

4 *Riddle v. Varnum*, 20 Pick. 280. The general rule in relation to the sale of personal property is also declared to be, that if anything remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties: *Hale v. Huntley*, 21 Vt. 147. And see *Warren v. Buckminster*, 24 N. H. 336, 342; *Gibbs v. Benjamin*, 45 Vt. 124. Compare *Stevens v. Eno*, 10 Barb. 95, 96.

5 *Riddle v. Varnum*, 20 Pick. 280. To effect a complete sale the contract must be executed, and nothing further to be done to ascertain the quantity, quality, or value of the property: *Gibbs v. Benjamin*, 45 Vt. 124. And see *Hutchings v. Gilchrist*, 23 Vt. 88. Where any act remains to be done before the sale is complete, the title remains in the seller, and he must sustain the loss caused by injury to the property: *Bertelson v. Bower*, 81 Ind. 512, 513.

6 *Macomber v. Parker*, 13 Pick. 175, 183. And see *Barrett v. Goddard*, 3 Mason, 107. Compare *Dixon v. Myers*, 7 Gratt. 240, 243.

7 See *Foster v. Ropes*, 11 Mass. 10; *Gilbert v. N. Y. Cent. R. R.* 4 Hun, 378; *Bailey v. Smith*, 43 N. H. 141; *McClurg v. Kelley*, 21 Iowa, 503; *Strauss v. Ross*, 25 Ind. 300; *Barrett v. Goddard*, 3 Mason, 107; *Paton v. Currie*, 19 Up. Can. Q. B. 388.

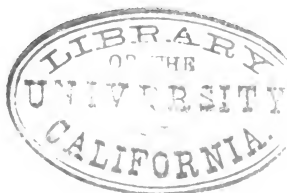
8 *Sumner v. Hamlet*, 12 Pick. 82; *Dennis v. Alexander*, 3 Barr. 50. And see *Hyde v. Lathrop*, 2 Abb. N. Y. App. 436; *Adams Mg. Co. v. Senter*, 26 Mich. 73.

9 *Arnold v. Delano*, 4 Cush. 40; 50 Am. Dec. 754; *Crofoot v. Bennett*, 2 Comst. 260; *Langdell's Cases on Sales*, 772. And see *Lockhart v. Pannell*, 22 Up. Can. C. P. 537.

10 See section on PUTTING INTO DELIVERABLE STATE.

11 See section on SELLER'S ACTS.

12 *Fuller v. Bean*, 34 N. H. 290, 300. Basis of foregoing statements and authorities: *Bennett's Benjamin on Sales*, § 319, n. c; *Macomber v. Parker*, 13 Pick. 175, 183; *Hubler v. Gaston*, 9 Or. 60; 42 Am. Rep. 794, 795; *Dixon v. Myers*, 7 Gratt. 240, 243; *Stevens v. Eno*, 10 Barb. 95, 96. And see *Brown on Sales*, 44; *Long on Sales* (ed. 1839), 267. Compare *Langdell's Cases on Sales*, 1026.



## CHAPTER VIII.

## SALES OF SPECIFIED CHATTELS.

- § 75. Goods subject to disposition by sale.
- § 76. Goods mingled with others.
- § 77. Bargain for specific quantity of grain.
- § 78. Identification of goods.
- § 79. Intention to retain title.
- § 80. Indications of such intention.
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- § 84. Seller's acts.
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- § 89. Distinction where sale complete and executed.
- § 90. Rule of presumption merely.
- § 91. Weighing, measuring, etc.
- § 92. Intention to pass title.
- § 93. Special circumstances.
- § 94. Acts to be done after delivery.
- § 95. Duty and agreement to deliver.
- § 96. Effect of delivery.
- § 97. Assumption of risk by acceptance.

§ 75. Goods subject to disposition by sale.—*In largest sense of term "sale."* The term "sale," in its largest sense,<sup>1</sup> may include every agreement for the transferring of ownership,<sup>2</sup> whether of immediate effect or to be completed afterwards;<sup>3</sup> and goods, in reference to the disposition of them by sale, may be considered as existing separately and ready for immediate delivery, or as a part of a larger mass from which they must be separated by counting, weighing, or measuring, or as goods to be hereafter procured and supplied to the buyer, or to be manufactured for his use.<sup>4</sup>

*Under common-law sale.* But goods of the first sort are the only proper subjects of a common-law sale, which is strictly a transaction operating as a present transfer of property,<sup>5</sup> and does not include executory contracts for the future sale and delivery of personal property.<sup>6</sup>

1 Definitions of sale, § 1.

2 Transfer of title: See subsequent chapter on that subject.

3 *Cunningham v. Ashbrook*, 20 Mo. 553, 556.

4 *Cunningham v. Ashbrook*, 20 Mo. 553, 556.

5 See § 9, on SALE OR EXECUTORY AGREEMENT.

6 *Cunningham v. Ashbrook*, 20 Mo. 553, 556. At least such is the general rule, although there are some apparently anomalous cases in which transactions in reference to goods to be separated from a mass seem to be treated, where there has been a constructive delivery, as valid sales, producing a present change of property: *Cunningham v. Ashbrook*, 20 Mo. 553, 556. See section on UNIFORM MASS.

§ 76. *Goods mingled with others. Need of separation, identification, etc.*—In general, the goods sold must be ascertained, designated, and separated from the mass before the property can pass.<sup>1</sup> And it is said to be a fundamental principle pervading everywhere the law of sales of chattels, that if goods be sold, while mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller<sup>2</sup> until the bargained property be separated and identified.<sup>3</sup>

*Passing of title to goods clearly identified.* But if the goods sold are clearly identified, then the title will pass, at least according to some of the cases, although it may be necessary to number, weigh, or measure the goods in order to ascertain what would be the price of the whole at a rate agreed upon between the parties.<sup>4</sup> Nor, as it has been declared, does it alter the principle that payment has been made in whole or in part, nor that they are unfit for delivery at the time of sale.<sup>5</sup>

*Commodity of uniform character.* Upon a sale of a specific quantity of grain or other commodity of uni-

form character, however, its separation from a mass undistinguishable in quality or value, in which it is included, is not necessary, according to some of the American cases, to pass the title when the intention to do so is otherwise clearly manifested.<sup>6</sup>

*Agreement to buy all the spring lambs of another.* And a contract whereby one party agrees to buy all the spring lambs of another, is entirely unlike the sale of certain articles out of a large number, as there is no setting apart to be done, or act of separation to be performed before the title and risk pass to the purchaser.<sup>7</sup>

1 Crofoot v. Bennett, 2 N. Y. 258, 259 ; Langdell's Cases on Sales, 772, 773. And see 2 Kent Com. 496.

2 2 Kent Com. 496. And see Hutchinson v. Grand Trunk Railway, 59 N. H. 487, 489.

3 Crofoot v. Bennett, 2 N. Y. 258, 259 ; Langdell's Cases on Sales, 772, 773. And see Hubler v. Gaston, 9 Or. 66 ; 42 Am. Rep. 794, 795.

4 Crofoot v. Bennett, 2 N. Y. 258, 260 ; Langdell's Cases on Sales, 772, 773. And see Russell v. Carrington, 42 N. Y. 118 ; 1 Am. Rep. 498 ; Macomber v. Parker, 13 Pick. 175 ; Riddle v. Varnum, 20 Pick. 282 ; Tyler v. Strange, 21 Barb. 198 ; Dexter v. Bevins, 42 Barb. 573 ; Burrows v. Whitaker, 71 N. Y. 291 ; 27 Am. Rep. 42, 45, 46 ; Brewer v. Salisbury, 9 Barb. 511, 515.

5 Hubler v. Gaston, 9 Or. 66 ; 42 Am. Rep. 794, 795.

6 See Kimberly v. Patchin, 19 N. Y. 330 ; Langdell's Cases on Sales, 775 ; Russell v. Carrington, 42 N. Y. 118, 122 ; 1 Am. Rep. 498, 500 ; McNamara v. Edmister, 11 Hun, 597, 601 ; Hurff v. Hires, 40 N. J. L. 531 ; 29 Am. Rep. 282. But see *contra*, Ferguson v. Northern Bank of Kentucky, 14 Bush, 555 ; 29 Am. Rep. 418 ; Commercial Nat. Bank v. Gillette, 90 Ind. 263 ; 46 Am. Rep. 222.

7 Bertelson v. Bower, 81 Ind. 512, 513, 514.

§ 77. *Bargain for specific quantity of grain.*—*Separated from other grain.* Where the terms of sale of specific personal property, as wheat in a store and apart by itself, are agreed on, and everything the seller has to do about them is complete, and the buyer is authorized to take them, the contract of sale becomes absolute without actual payment or delivery, so that the property is in the vendee, and the risk of loss by accident devolves upon him.<sup>1</sup>

*Specified quantity of unseparated grain.* And the same is true where the owner of a large quantity of grain in bulk sells a certain number of bushels therefrom, and receives his pay, though none so sold is separated from the general mass.<sup>2</sup>

*No specification of quantity or location.* But where no specific quantity is bargained for, and from no specific lot, but only enough to fill whatever bags the vendee might send, the property does not pass, and the grain is still at the risk of the seller.<sup>3</sup>

1 See *Phillips v. Moor*, 71 Me. 78 ; *Levasseur v. Cary*, 3 Atl. Rep. 461 ; Sup. Ct. Me. March 22, 1883.

2 See *Waldron v. Chase*, 37 Me. 414 ; *Levasseur v. Cary*, 3 Atl. Rep. 461.

3 *Levasseur v. Cary*, 3 Atl. Rep. 461 ; S. C. 22 The Reporter, 304.

§ 78. *Identification of goods. — Sufficiency of.* If the goods are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes.<sup>1</sup> Thus, if there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified, though not separated.<sup>2</sup>

*Designation by marking.* A designation by some visible mark is a sufficient separation, and it is not necessary that an artificial mark should be made for this sole purpose.<sup>3</sup> And if barrels have been inspected and marked as of different qualities, such as No. 1, No. 2, No. 3, and the whole of that which is marked No. 1 is sold, a bill of sale given, and a formal delivery made, the property will pass without any further separation or designation, and the delivery will have been perfected, although the barrels No. 1 are left intermingled with other barrels which have different marks.<sup>4</sup>

1 *Arnold v. Delano*, 4 Cush. 40 ; 50 Am. Dec. 754, 758.

2 *Arnold v. Delano*, 4 Cush. 40 ; 50 Am. Dec. 754, 758.

3 Ropes v. Lane, 9 Allen, 502, 510.

4 Ropes v. Lane, 9 Allen, 502, 510. So if there are one hundred barrels marked No. 1, and the owner makes a contract to sell one hundred and fifty barrels of that mark, and makes his bill of sale and formal delivery, affirming that there are that number of barrels in the lot, the property in the one hundred barrels will pass to the vendee: Ropes v. Lane, 9 Allen, 502, 510.

§ 79. **Intention to retain title.** — *Intendment in favor of transfer of title.* — Where specific and ascertained chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain,<sup>1</sup> and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser.<sup>2</sup>

*Unperformed acts indicating contrary intention.* Such an intention is generally shown by the fact of some further act being first required to be done; such as, for instance, in most cases, delivery; in some cases, actual payment of the price; and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like.<sup>3</sup> And it is said that if the terms of the contract do not show an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done.<sup>4</sup>

1 Transfer of title: See subsequent chapter on that subject.

2 Heilbutt v. Hickson, Law R. 7 Com. P. 438, 449; 3 Eng. Rep. 328, 337. And see Calcutta Co. v. De Mattos, 32 Law J. Q. B. 322, 329; Gilmour v. Supple, 11 Moore P. C. C. 551, 553; Langdell's Cases on Sales, 624, 632; Morse v. Sherman, 106 Mass. 430, 433; Jenkins v. Jarrett, 70 N. C. 255, 256.

3 Heilbutt v. Hickson, Law R. 7 Com. P. 438, 449; 3 Eng. Rep. 328, 337. But see Riddle v. Varnum, 20 Pick. 283, 284. See section on INTENTION TO TRANSFER TITLE.

4 Logan v. Le Mesurier, 6 Moore P. C. C. 116; Langdell's Cases on Sales, 681, 690.

§ 80. **Indications of such intention.**—*By various circumstances.* Various circumstances are said to have been treated by the courts as sufficiently indicating the intention of the parties that the property shall not vest in the buyer, and a right to the price in the seller, under a contract for the sale of specific ascertained goods.<sup>1</sup>

*Acts by seller on his own behalf.* Thus, if it appears that the seller is to do something to the goods on his own behalf, such as weighing them,<sup>2</sup> the property will not be changed until he has done it, or waived his right to do it.<sup>3</sup>

*Seller's acts for buyer's benefit, etc.* And another rule which may be extracted from a case where casks were not filled up as agreed,<sup>4</sup> is declared to be that where the seller is to do some act for the benefit of the buyer, to place the goods sold in a state to be delivered, until he has done it the property does not pass.<sup>5</sup>

1 *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 632. See § 83, on BY WHOM ACT TO BE DONE.

2 See *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639; *Ross's Leading Cases*, 20.

3 *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 633.

4 *Rugg v. Minett*, 11 East, 210; *Langdell's Cases on Sales*, 647; *Ross's Leading Cases*, 30.

5 *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 633. So, also, if an act remains to be done by or on behalf of both parties before the goods are delivered, the property is not changed: *Gilmour v. Supple*, 11 Moore P. C. C. 551; citing as illustration, *Wallace v. Breeds*, 13 East, 522; *Langdell's Cases on Sales*, 739; *Ross's Leading Cases*, 43.

§ 81. **Act remaining to be done.**—*By seller before delivery.* It is said to be a settled principle that where anything remains to be done by the vendor before the article is to be delivered,<sup>1</sup> the right of property has not passed.<sup>2</sup>

*Purposes of seller's acts.* But though the authorities are numerous where the expression is used, that if anything remains to be done by the seller the title



does not pass,<sup>3</sup> yet the cases which are referred to in order to sustain that position are asserted to only go the length of showing that the title does not pass where something is to be done by the seller to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition which the terms of the contract require.<sup>4</sup>

*Quantity, quality, etc., to be determined by vendee.* And if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid are still to be determined by the vendee.<sup>5</sup>

*Seller's act under buyer's direction.* So the property may pass by the contract of sale, even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as for instance, loading the goods upon a vessel for transportation.<sup>6</sup>

1 See § 86, on PUTTING INTO DELIVERABLE STATE.

2 *Ward v. Shaw*, 7 Wend. 404; *Langdell's Cases on Sales*, 703, 704. And see *Hale v. Huntley*, 21 Vt. 147, 150. If anything remains to be done on the part of the seller, as between him and the buyer before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer: *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 633, 646.

3 *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 709. And see *Gibbs v. Benjamin*, 45 Vt. 124, 128; *Hale v. Huntley*, 21 Vt. 147, 150.

4 *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 703, 709; citing, 2 Kent Com. 496; *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639; *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659; *Joyce v. Adams*, 4 Seld. 291; *Field v. Moore*, Lalor's Supp. 418. See section on SOMETHING TO BE DONE.

5 *Lingham v. Eggleston*, 27 Mich. 324, 329; citing, *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 632; *Kohl v. Lindley*, 39 Ill. 195.

6 *Lingham v. Eggleston*, 27 Mich. 324, 329, and following cases therein cited; *Whitcomb v. Whitney*, 21 Mich. 486; *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706.

§ 82. *Unperformed acts not affecting title.—Where goods sufficiently designated.* If the goods sold are sufficiently designated so that no question can arise as to

the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, where the price depends upon either or both, should be determined.<sup>1</sup> For all these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them is conclusive, nor are all combined.<sup>2</sup>

*Quantity may remain to be ascertained.* Thus it is said that it is not the law that the right of property in a chattel cannot pass by a sale, so long as the quantity of the thing sold remains to be ascertained.<sup>3</sup> But it is only when something is to be done for the ascertainment of the quantity by the very terms of the contract that it is incomplete.<sup>4</sup>

*Various things lacking.* And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting, and many things to be done by one or both the parties to fix conclusively the sum to be paid, or to determine some other fact material to their respective rights.<sup>5</sup>

1 Lingham v. Eggleston, 27 Mich. 324, 327.

2 Lingham v. Eggleston, 27 Mich. 324, 327. Intention to transfer title: See section on that subject.

3 Dennis v. Alexander, 3 Burr. 50, 51; citing, Scott v. Wells, 6 Watts & S. 368.

4 Dennis v. Alexander, 3 Burr. 50, 51. And see Adams Mining Co. v. Senter, 26 Mich. 73, 80.

5 Lingham v. Eggleston, 27 Mich. 324, 328.

§ 83. *By whom act to be done.*—*Sometimes deemed immaterial.* It is sometimes declared that it is indifferent whether the act to be done to render the sale complete is to be done by the buyer, or by the seller, or by a third person;<sup>1</sup> and the principle is said to be well settled that the title does not pass when anything remains

to be done by either<sup>2</sup> or both of the parties, precedent to the delivery.<sup>3</sup>

*By seller, under general view.* But the principle derived from the earlier leading cases upon the subject, and involved in the rule that where anything remains to be done to the goods for ascertaining the price, as weighing, etc., the performance is a condition precedent to the transfer of the property,<sup>4</sup> has been considered to be that something remains to be done by the seller;<sup>5</sup> and it has been doubted whether the statement of such rule<sup>6</sup> was meant to include a case where all that remains to be done was to be done by the buyer, with full authority from the seller to do the act.<sup>7</sup> So many of the cases speak of the act to be done as that of the seller;<sup>8</sup> and in some of the cases at common law the language is said to be capable of being understood as importing that if an act remains to be done between the parties, it must, in order to render the sale imperfect, and prevent the property from passing, be an act to be done by the seller, and one necessary to designate and identify the goods to be sold,<sup>9</sup> and not an act to be done by the buyer, or merely to ascertain the price<sup>10</sup> to be paid.<sup>11</sup> Furthermore, in a summary of the law upon the subject, as developed in select cases, it is laid down that so long as something remains to be done to the goods by the seller, before the buyer is entitled to possession of them, or before he is bound to receive them in performance of the contract, the presumption is that the title remains in the seller.<sup>12</sup>

*Inconsistent statements.* But even in the same case where it was declared that if anything remains to be done "on the part of the seller," until that is done the property is not changed, it was said that "the concurrence of the seller" in the particular act to be done was necessary.<sup>13</sup> So in stating the rule as to presumptive

conditions precedent to the transfer of the property, consisting of acts to ascertain the price, mention is made of anything which is to be done "by the vendor or by the mutual concurrence of both parties."<sup>14</sup> And in a restatement of the result of the authorities bearing upon the rules of presumption governing the transfer of title to undelivered specific chattels,<sup>15</sup> it is said that the presumption is against a change of ownership, in the absence of circumstances indicating a contrary intention, if something still remains to be done to the chattels "by the seller alone, or by some other person, as an act demanding at least the seller's concurrence under the contract for his own benefit."<sup>16</sup>

*More comprehensive declaration.* Yet in considering the various circumstances indicative of an intention that the title to specific chattels shall not pass to the buyer, it is regarded as sufficient to prevent the change of property that the vendor is to do something to the goods on his own behalf, or for the benefit of the buyer, to put the goods in a deliverable state, or that an act remains to be done by or on behalf of both parties before delivery.<sup>17</sup>

1 Fuller v. Bean, 34 N. H. 290, 301. And also whether it is to be done to ascertain the goods to be sold by their designation, or measurement, or their quality, by the buyer or the public inspector, or merely to ascertain the price to be paid by the appraisal of a third person, or by counting, weighing, or the like, or whether there is an omission to do any other act necessary to enable the property to pass in conformity to the agreement, such as might be the payment of duties on goods imported, or the transportation to a distant place: Fuller v. Bean, 34 N. H. 290, 301.

2 "If a sale is not complete, if anything remains to be done concerning the property by either party, a present right of property does not vest in the buyer": Prescott v. Locke, 51 N. H. 94, 102.

3 Gibbs v. Benjamin, 45 Vt. 124, 128. And see Prescott v. Locke, 51 N. H. 94, 102. Quantity dependent on act or will of third party: Brock v. O'Donnell, 45 N. J. L. 441, 444.

4 See section on ASCERTAINING PRICE.

5 Turley v. Bates, 2 Hurl. & C. 200; Langdell's Cases on Sales, 692, 699; reviewing Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 630; Hinde v. Whitehouse, 7 East, 553; Langdell's Cases on Sales, 102; Rugg v. Minett, 11 East, 210; Langdell's Cases on Sales, 647; Zagury v. Furnell, 2 Camp. 210; Langdell's Cases on Sales, 652; Simmons v. Swift, 5 Barn. & C. 857; Langdell's Cases on Sales, 650.

6 In Blackburn on Sales, 152.

7 Turley v. Bates, 2 Hurl. & C. 200; Langdell's Cases on Sales, 692, 698.

8 See Ward v. Shaw, 7 Wend. 404; Langdell's Cases on Sales, 703, 704; Terry v. Wheeler, 25 N. Y. 520; Langdell's Cases on Sales, 706, 709; Hale v. Huntley, 21 Vt. 147, 150; Gibbs v. Benjamin, 45 Vt. 124, 128; Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639, 646; Rugg v. Minett, 11 East, 210; Langdell's Cases on Sales, 647, 651; Zagury v. Furnell, 2 Camp. 240; Langdell's Cases on Sales, 652, 653. Or as to be done on the part of the seller: Simmons v. Swift, 5 Barn. & C. 857; Langdell's Cases on Sales, 659, 662.

9 See section on IDENTIFICATION OF GOODS.

10 See section on ASCERTAINING PRICE.

11 Fuller v. Bean, 34 N. H. 290, 300, 301, taking a different view.

12 Langdell's Cases on Sales, 1026; citing, Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639; Rugg v. Minett, 11 East, 210; Langdell's Cases on Sales, 647; Wallace v. Breeds, 13 East, 522; Langdell's Cases on Sales, 739; Zagury v. Furnell, 2 Camp. 240; Langdell's Cases on Sales, 652; Withers v. Lyss, 4 Camp. 237; Langdell's Cases on Sales, 654; Busk v. Davis, 2 Maule & S. 397; Langdell's Cases on Sales, 747; Shepley v. Davis, 5 Taunt. 617; Langdell's Cases on Sales, 752; Laidler v. Burlinson, 2 Mees. & W. 602; Langdell's Cases on Sales, 664; Acraman v. Morrice, 19 Law J. Com. P. 57; Langdell's Cases on Sales, 676; comparing Hinde v. Whitehouse, 7 East, 553; Langdell's Cases on Sales, 102, 109, 110.

13 See Simmons v. Swift, 5 Barn. & C. 857; Langdell's Cases on Sales, 659, 662.

14 Lingham v. Eggleston, 27 Mich. 324, 329.

15 See sections on PUTTING INTO DELIVERABLE STATE, and ASCERTAINING PRICE.

16 2 Schouler on Personal Property, § 255.

17 Gilmour v. Supple, 11 Moore P. C. C. 551; Langdell's Cases on Sales, 625, 632, 633.

## § 84. Seller's acts.—*Weighing undelivered portion.*

In regard to acts to be done to undelivered goods by the seller, it has been held where the purchasers became bankrupt before all of the goods were weighed and delivered,<sup>1</sup> that the act of weighing the portion not yet delivered, which was to be done by warehouse-keepers under the seller's orders, was one of those things in the nature of conditions precedent, or preliminary acts to the vesting of the property in the buyers.<sup>2</sup> So where an agreement was made to buy the bark stacked at a certain place, so that the subject-matter of the sale was clearly ascertained, but it was to be paid for at a certain price per ton, it was deemed necessary to ascertain the

weight before the total amount due could be calculated, and as the concurrence of the seller in the act of weighing, to be done by representatives of both parties, was regarded as essential, it was declared that the property had not passed to the buyer, and that the seller was liable for injury by flood to an unremoved and unweighed portion of the bark.<sup>3</sup>

*Filling up casks.* Again, it has been held that the property did not pass to the buyer of certain casks of turpentine, which were not filled up by the seller according to contract at the time they were destroyed by the burning of the warehouse, wherein they and the other casks bought with them were to be reweighed and gauged.<sup>4</sup>

*Counting skins.* And where the seller of goat skins had not at the time they were destroyed by fire counted them over to see whether each bale contained the number specified in the contract, as required by the usage of trade, it was held that as this act for the benefit of the seller and necessary to ascertain the price remained to be done, there was not a complete transfer to the purchaser, and the articles continued at the seller's risk.<sup>5</sup>

*Trimming and severing parts of timber trees.* Furthermore, the bankrupt seller has been held entitled to hold timber where the trees had been felled, and selected portions of the trunks marked out as the subject of the purchase, and had been removed to a wharf for purposes of transmission, but had not yet been topped, lopped, or sided, nor had the marked parts been severed from the bodies of the trees.<sup>6</sup>

*Measuring and delivering timber.* So under the construction given on the basis of the intention of the parties to a contract for the sale of timber, stated to measure a certain number of feet, "more or less," and to be paid for at a specified rate per foot, "measured off," etc., it

was held that the seller was the party to make the measurement, and that the property did not pass before measurement and delivery at the agreed place.<sup>7</sup>

*Failing to add up contents of timber trees.* But the mere omission to add up the total contents of timber trees which were marked and measured, where the figures indicating the number of cubic feet were put down on paper, has been held too trifling an incident to warrant a decision that anything remained to be done for the completion of the contract.<sup>8</sup>

1 *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639. Stated or noted: *Messer v. Woodman*, 22 N. H. 172, 178, 179; *Barrett v. Goddard*, 3 Mason, 107, 111; *Elgee Cotton Cases*, 22 Wall. 180, 189; *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 621, 632, 633.

2 *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639. Because by the particular terms of the contract whereby the purchase was of all of the commodity that lay in the warehouse, more or less, whatever it was, at a specified sum per hundred weight, the weight to be afterwards ascertained at such rate, the price was made to depend upon the weight, and no time-bill for the price could yet be given as stipulated: *Hanson v. Meyer*, 6 East, 615. And see *Withers v. Lyss*, 4 Camp. 237; *Langdell's Cases on Sales*, 654, 655.

3 *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659, 662. But the decision was mainly based upon the ground of a want of delivery under the contract: *Simmons v. Swift*, 5 Barn. & C. 857. See p. 663 in *Langdell's Cases on Sales*. Case stated or noted: *Elgee Cotton Cases*, 180, 189; *Messer v. Woodman*, 22 N. H. 172, 178; *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 634.

4 *Rugg v. Minett*, 11 East, 210; *Langdell's Cases on Sales*, 647; noted, *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 633; *Foster v. Ropes*, 111 Mass. 10, 15.

5 *Zagury v. Furnell*, 2 Camp. 240; *Langdell's Cases on Sales*, 652, 653. Compare facts of *Burrows v. Whitaker*, 71 N. Y. 291; 27 Am. Rep. 42; *Prescott v. Locke*, 51 N. H. 94.

6 *Acraman v. Morrice*, 19 Law J. Com. P. 57; *Langdell's Cases on Sales*, 676, 679, 680.

7 *Logan v. Le Mesurier*, 6 Moore P. C. C. 116; *Langdell's Cases on Sales*, 631, 631. Hence the purchasers could recover back the price paid, and damages for failure to deliver, less the value of such timber as was received, where the raft of timber sold was broken up by a storm, and a great part of the timber lost before it was measured and delivered: *Logan v. Le Mesurier*, 6 Moore P. C. C. 116. Case distinguished, *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 634; noted, *Elgee Cotton Cases*, 22 Wall. 180, 190.

8 *Tansley v. Turner*, 2 Scott, 238, 241.

§ 85. *Buyer's acts.*—*To goods in his possession, etc.* Though it is a general principle of the law regulating

sales of personal property, subject to many qualifications, and varying with the intention of the parties, that the sale is not completed when anything remains to be done to the thing sold to identify it or discriminate it from other things,<sup>1</sup> yet it seems that where possession is given to the buyer, and the act necessary for the designation of the articles sold is to be performed by him and not by the seller, title would pass absolutely to the purchaser.<sup>2</sup>

*Quantity to be settled.* Thus, where a quantity of goods was constructively delivered to the buyer, with the understanding that if they were not more than he had bargained for he might keep them, but if they were more, the seller was to have the balance, and a creditor of the vendor attached the goods after a small portion of those purchased had been set apart by the buyer, the court held that the contract was executed, and not executory, and that the portion of the goods which had been included in the bargain was not liable to attachment for the debts of the seller.<sup>3</sup>

*Reason of general rule.* The reason of the general rule seems to be that it is for the benefit of the vendor that the property should pass, because the risk of loss is thereby transferred to the purchaser, whilst the vendor retains possession to secure payment of the price.<sup>4</sup> Hence, where the agreement is that he is to do something before he can compel the purchaser to accept the goods, the intention of the parties should be taken to be, that the vendor was to do this before he obtained the benefit of the transfer of the property.<sup>5</sup>

*When inapplicable.* But the presumption would be unreasonable when the acts were to be done by the buyer, as the latter would thus be rewarded for his own default.<sup>6</sup> And in general it is the intention of the parties that the law endeavors to arrive at, and when



that is ascertained it will usually determine the nature of the contract.<sup>7</sup>

*Exact price to be ascertained.* So it has been laid down that where the minds of the parties have assented to the present purchase and sale of a specific chattel, which may be clearly identified and separated from other property, and the sale is dependent on no conditions or contingencies, and such possession is given as the nature of the subject, and the situation of the parties with regard thereto will permit of, and the vendor has done all that is required of him with respect to the property, the title will pass, notwithstanding something may still be necessary on the part of the vendee to ascertain the exact price.<sup>8</sup>

*Casks to be gauged.* In regard to the effect of acts to be done by the buyer, upon the passing of title to specific chattels, it has been held that there was no change of ownership and risk where gauging by a custom-house officer before removal of casks of turpentine which had been filled up and left with the bungs out, remained to be done, as the performance of this act was the buyer's business, and the sellers had done all to the goods that was required of them.<sup>9</sup>

*Weighing of goods transferred on books.* So where the identity of the goods and the quantity are known, so that weighing can only be for the satisfaction of the buyer, a transfer in the wharfinger's books without weighing has been held sufficient to pass the property as between the buyer and seller.<sup>10</sup>

*Specification and measurement of logs.* And where the evidence showed it to be usual for purchasers of rafts, sometimes before, sometimes after, they were placed within booms, to check over the logs received with the specification previously delivered, to see that they corresponded with it, but there was no evidence

of its being usual to measure the contents of each log to ascertain the number of feet contained in it, it was held that the property passed, where from the specification the buyer knew what quantity of timber the seller would charge him with, notwithstanding the form of the written contract, which left it unascertained.<sup>11</sup>

*Weighing of carted clay.* Furthermore, where the buyer was, at his own expense, to load and cart away a heap of fire-clay, bought as a whole stack, and have it weighed at a machine which the carts would pass, it was held that the parties had made their intention sufficiently clear that the property should pass, notwithstanding the clay was to be subsequently weighed;<sup>12</sup> and it was doubted whether the ordinary rule against the transfer of the property, while acts to ascertain the price, amounting to conditions precedent, were unperformed,<sup>13</sup> was meant to include a case where all that to be done was to be done by the buyer with full authority from the seller to do the act.<sup>14</sup>

1 Wells v. Littlefield, 59 Tex. 556, 560; citing, 1 Parsons on Contracts, 527; Blackburn on Sales, 152; Benjamin on Sales, §§ 311, 311 a, 319.

2 Wells v. Littlefield, 59 Tex. 556, 560; citing, 1 Parsons on Contracts, 527; Tarling v. Baxter, 6 Barn. & C. 360; Langdell's Cases on Sales, 621; Russell v. Carrington, 42 N. Y. 124; 1 Am. Rep. 498; Blackburn on Sales, 152; Benjamin on Sales, § 353; Page v. Carpenter, 10 N. H. 77.

3 Page v. Carpenter, 16 N. H. 77.

4 Wells v. Littlefield, 59 Tex. 566, 560.

5 See Blackburn on Sales, 152.

6 See Blackburn on Sales, 153.

7 Wells v. Littlefield, 59 Tex. 556, 560. Hence, where cattle have been actually delivered into the possession of the purchaser, and the purchase money has been virtually paid, the seller, who has done all that he agreed to do, is not liable for any loss that might accrue to the property because of any delay or neglect on the part of the buyer to make the stipulated appropriation of his share of it: Wells v. Littlefield, 59 Tex. 556, 560.

8 King v. Jarman, 35 Ark. 190, 197.

9 Rugg v. Minett, 11 East, 210; Langdell's Cases on Sales, 647, 651; Ross's Leading Cases, 30, 35, 36; followed, McNeil v. Kelleher, 15 Up. Can. C. P. 470, 474.

10 *Swanwick v. Sothorn*, 9 Ad. & E. 895; *Langdell's Cases on Sales*, 673, 676; citing, *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; *Ross's Leading Cases*, 218; cited, *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624, 634.

11 *Gilmour v. Supple*, 11 Moore P. C. C. 551; *Langdell's Cases on Sales*, 624. As there was nothing to be done by the seller for himself or for the buyer, or by the concurrence of both parties either to ascertain the price by further measurement, or for any other purpose: *Gilmour v. Supple*, 11 Moore P. C. C. 551.

12 *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692, 699.

13 See section on ASCERTAINING PRICE.

14 *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692, 698.

§ 86. Putting into deliverable state.—*Need of, as suspending transfer of title.* In the sale of personal property, the general rule of law is stated to be that where, by the terms of the contract, the seller agrees to do anything for the purpose of putting the property into a state in which the buyer is bound to accept it, or into a condition to be delivered, the title will remain in him until he has performed the agreement in this respect.<sup>1</sup>

*Blackburn's first rule.* This doctrine substantially follows the familiar first rule of Lord Blackburn,<sup>2</sup> that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state,<sup>3</sup> the performance of those things shall, in the absence of circumstances indicating a contrary intention,<sup>4</sup> be taken to be a condition precedent<sup>5</sup> to the vesting of the property.<sup>6</sup>

*By other acts than weighing and measuring.* And other acts besides weighing and measuring which are made requisite on the part of the seller to put the goods in a deliverable state, in compliance with the mutual contract, have been generally held to postpone the vesting of the seller's property,<sup>7</sup> such as baling and pressing a lot of hops,<sup>8</sup> scaling logs,<sup>9</sup> drying and weighing fish,<sup>10</sup>

marking stems, and otherwise preparing tobacco,<sup>11</sup> and taking out and comparing samples of cotton.<sup>12</sup>

*Intention of parties controls.* But it has been laid down in England, that if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable.<sup>13</sup> And the American decisions are said to unmistakably hold that any presumption of a suspension of the transfer of title may be overcome by proof of mutual intention that the property should pass before the thing was put into a deliverable condition.<sup>14</sup>

1 Foster v. Ropes, 111 Mass. 10, 15. And see Macomber v. Parker, 13 Pick. 175, 183; Terry v. Wheeler, 25 N. Y. 520; Langdell's Cases on Sales, 706, 709; Cooke v. Millard, 65 N. Y. 352; 22 Am. Rep. 619, 628.

2 See Elgee Cotton Cases, 22 Wall. 180, 193; Foster v. Ropes, 111 Mass. 10, 15.

3 See Barrett v. Goddard, 3 Mason, 107, 111; Rugg v. Minett, 11 East, 210; Langdell's Cases on Sales, 647, 651; Gilmour v. Supple, 11 Moore P. C. C. 51; Langdell's Cases on Sales, 624, 635.

4 Intention to transfer title: See section on that subject.

5 Condition precedent: See chapter on CONDITIONAL SALES.

6 Blackburn on Sales, 151, 152; quoted, Langton v. Higgins, 4 Hurl. & N. 402; Langdell's Cases on Sales, 867, 872; Elgee Cotton Cases, 22 Wall. 180, 183; Prescott v. Locke, 51 N. H. 94, 101; Bennett's Benjamin on Sales, § 318; citing following further cases: Bailey v. Smith, 43 N. H. 141; Gilbert v. N. Y. Cent. R. R. Co. 4 Hun, 378; Strauss v. Ross, 25 Ind. 300; McClung v. Kelley, 21 Iowa, 508; Paton v. Currie, 19 Up. Can. Q. B. 238. Consult, also, 1 Corbin's Benjamin on Sales, § 364; Campbell on Sales, 229; 2 Schouler on Personal Property, § 249. And compare Langdell's Cases on Sales, 1026.

7 2 Schouler on Personal Property, § 250.

8 Keeler v. Vandemere, 5 Lans. 313.

9 Begole v. McKenzie, 23 Mich. 470; Wilkinson v. Holaday, 33 Mich. 336. But see Morrow v. Reed, 30 Wis. 81.

10 Foster v. Ropes, 111 Mass. 10.

11 Dixon v. Myers, 7 Gratt. 240.

12 Kein v. Tupper, 52 N. Y. 550.

13 Turley v. Bates, 2 Hurl. & C. 200; Langdell's Cases on Sales, 696; quoting Blackburn on Sales, 153, as citing Woods v. Russell, 5 Barn. & Adol. 942; Langdell's Cases on Sales, 794; and Clarke v. Spence, 4 Ad. & E. 448; Langdell's Cases on Sales, 816.

14 2 Schouler on Personal Property, § 250; citing Cushman v. Holyoke, 34 Me. 239; Dyer v. Libby, 61 Me. 45; Bemis v. Morrill, 38 Vt. 120; Riddle v. Varnum, 20 Pick. 280; Foster v. Ropes, 111 Mass. 10; Boswell v. Green, 1 Dutch. 390. Like effect: Bennett's Benjamin on

Sales, § 334, n. *t*; citing, also, *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Fuller v. Bean*, 34 N. H. 302; *Marble v. Moore*, 102 Mass. 443; *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706; *Burr v. Williams*, 23 Ark. 244; *Ford v. Chambers*, 28 Cal. 13.

§ 87. **Ascertaining price.**—*Acts for, as presumptive conditions precedent.* Numerous authorities are said to uniformly hold that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods,<sup>1</sup> the performance of those things is to be deemed presumptively a condition precedent<sup>2</sup> to the transfer of the property,<sup>3</sup> although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted.<sup>4</sup>

*Blackburn's second rule.* This statement of the law essentially conforms to Lord Blackburn's second rule, that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.<sup>5</sup>

*Broad statement of doctrine.* More broadly it is declared that the right of property and the risk of loss are not altered if anything remains to be done as between the seller and purchaser, for the purpose of ascertaining the price of the article which is the subject-matter of the contract;<sup>6</sup> and this statement is illustrated by the cases of hay to be weighed out of a mow,<sup>7</sup> property to be put in a marketable condition and then weighed,<sup>8</sup> timber to be measured,<sup>9</sup> and carpeting sent to the house of the purchaser to be cut from the roll.<sup>10</sup>

*Rule criticised and limited.* But the rule itself has been criticised by its formulator as not distinguishing between acts of weighing, etc., preliminary to the buyer's taking possession, and these which must be done before the vesting of the property;<sup>11</sup> and as having been hastily adopted from the civil law,<sup>12</sup> without consideration of the distinction between a fixed price required by that law and an ascertainable price alone necessary<sup>13</sup> under our own.<sup>14</sup>

*Where object only to satisfy purchaser.* And the distinction must be observed between a sale by measure or weight requiring the weighing or measuring to be accomplished for the purpose of determining or fixing the price,<sup>15</sup> and the sale of specific goods in the lump at an ascertained price, accompanied with a representation or warranty of the weight or quality,<sup>16</sup> where the weighing or measuring is necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for,<sup>17</sup> and the title passes to the purchaser as soon as the contract is concluded.<sup>18</sup>

*Where price mere matter of computation.* So the distinction is taken between the sale of a certain specific lot of goods at an agreed weight, measurement, etc., and on fixed terms, whereby the estimated weight, etc., though turning out to be inaccurate, is final between the parties,<sup>19</sup> in which case the title immediately passes, because the ascertainment of the price at the rate fixed is a mere mathematical computation,<sup>20</sup> and the sale of a specific lot of goods at a fixed rate, where the total price is to be according to what the goods may prove to weigh or measure, in which case there remains a further test to be applied before the exact amount payable can be determined.<sup>21</sup>

1 Price generally: See previous chapter on that subject.

2 Condition precedent: See chapter on CONDITIONAL SALES.

- 3 Transfer of title : See subsequent chapter on that subject.
- 4 *Lingham v. Eggleston*, 27 Mich. 324, 329.
- 5 *Blackburn on Sales*, 152 ; quoted, *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 697, 698 ; *Langton v. Higgins*, 4 Hurl. & N. 402 ; *Langdell's Cases on Sales*, 867, 872 ; *Elgee Cotton Cases*, 22 Wall. 180, 188 ; *Hutchinson v. Hunter*, 7 Pa. St. 140, 143 ; *Prescott v. Locke*, 51 N. H. 94, 101 ; *Bennett's Benjamin on Sales*, § 319 ; 1 *Corbin's Benjamin on Sales*, § 365. And compare *Campbell on Sales*, 229 ; 2 *Schouler on Personal Property*, § 249.
- 6 *Story on Sales*, § 220 b.
- 7 *Davis v. Hill*, 3 N. H. 382.
- 8 *Ward v. Shaw*, 7 Wend. 404 ; *Langdell's Cases on Sales*, 703.
- 9 *McDonald v. Hewett*, 15 Johns. 349.
- 10 *Andrew v. Dieterich*, 14 Wend. 31 ; stated and distinguished, *Brewer v. Salisbury*, 9 Barb. 511, 513, 514.
- 11 See *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 698.
- 12 See *Pothier Contrat de Vente*, No. 308 ; *La. Civ. Code*, art. 2433 ; 2 *Schouler on Personal Property*, § 249 ; *Prescott v. Locke*, 51 N. H. 94, 101.
- 13 See section on subject in chapter on PRICE.
- 14 See *Lingham v. Eggleston*, 27 Mich. 324, 329, 330 ; *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 698. Quoting *Blackburn on Sales*, 153. And consult *Hutchinson v. Hunter*, 7 Pa. St. 140, 143, 144. Nor does the rule apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once : *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 693. For the intention of the parties must be looked at in every case : *Turley v. Bates*, 2 Hurl. & C. 200. Citing in support, *Logan v. Le Mesurier*, 6 Moore P. C. C. 116 ; *Langdell's Cases on Sales*, 681 ; *Hinde v. Whitehouse*, 7 East, 558 ; *Langdell's Cases on Sales*, 102 ; *Blackburn on Sales*, 151. See *Martineau v. Kitching*, *Law R. 7 Q. B.* 436, 449 ; 2 *Eng. Rep.* 539, 553.
- 15 Determination of Price : See under chapter on PRICE.
- 16 Warranty : See subsequent chapter on that subject.
- 17 See 2 *Schouler on Personal Property*, § 251.
- 18 *Story on Sales*, § 220 c. See *Walrath v. Ingles*, 64 Barb. 265, 276 ; citing, *Addison on Contracts*, 225.
- 19 See citations in next note.
- 20 See *Welch v. Moffatt*, 1 *Thomp. & C.* 575 ; *Adams Mining Co. v. Senter*, 26 Mich. 73, 79, 80.
- 21 2 *Schouler on Personal Property*, § 251. But even in the latter case, the courts seem disinclined to apply the rule which suspends the transfer of title and risk pending the weighing or measuring : 2 *Schouler on Personal Property*, § 251 ; citing, *Swanwick v. Sothern*, 9 Ad. & E. 895 ; *Langdell's Cases on Sales*, 673 ; *Groat v. Gile*, 51 N. Y. 431 ; *Riddle v. Varnum*, 20 Pick. 280 ; *Cunningham v. Ashbrook*, 20 Mo. 533 ; *Adams Mining Co. v. Senter*, 26 Mich. 73.

§ 88. *Price left unadjusted.—Limitation of principle.* It has been said that while it may be true as a general proposition that if anything remains to be done by either party

to a contract for the sale of personal property, to determine the price, quantity, or identity of the thing sold,<sup>1</sup> the title does not vest in the purchaser, and the contract is merely executory,<sup>2</sup> yet this principle must be limited to those cases in which the evidence does not show an intention to make the sale absolute and complete, without any regard to the performance of these usual prerequisites, at least as to price and measurement.<sup>3</sup>

*Intention as to identified goods.* And if the goods are completely identified, a complete sale of them may be made without fixing an absolute price, if such be the clear intention of the parties, as legally evidenced by the circumstances attending the transaction.<sup>4</sup>

1 See section on SOMETHING TO BE DONE.

2 See *Allen v. Maury*, 66 Ala. 10; *Chitty on Contracts*, 10.

3 *Shealy v. Edwards*, 73 Ala. 175, 179; 49 Am. Rep. 43.

4 *Shealy v. Edwards*, 73 Ala. 175, 179; 49 Am. Rep. 43. As where the price was left to be fixed by future agreement between the parties, and the goods were attached by the seller's creditor before any such agreement was reached: *Shealy v. Edwards*, 73 Ala. 175, 179.

## § 89. Distinction where sale complete and executed.—

*Rule as to price in executory contracts.* The rule as to price in executory contracts of sale, is stated to be that it must be certain, or capable of being made certain,<sup>1</sup> so that if it is to be fixed by arbitration, and the arbitrators fail to agree, the sale must be considered void.<sup>2</sup>

*Principle and illustration where contract executed.* But a different principle is said to prevail where the contract of sale is complete and executed,<sup>3</sup> in which class of contracts, where the seller, whether by actual delivery or by other like unequivocal act, intentionally passes the property in specific goods to the purchaser, without fixing the price,<sup>4</sup> the law leaves the price to be adjusted by the agreement of the parties,<sup>5</sup> or in case they fail to agree, to be determined by the verdict of a jury.<sup>6</sup> Hence, where a stock of goods, old and new,



was sold and delivered, and the new was disposed of at invoice prices, but the old at prices to be agreed on at a fixed time in the future, the purchaser giving his notes for the estimated price of the whole, to be increased or diminished according to the eventual agreement as to the old goods, it was held that the title passed, and that no lien was acquired by a creditor of the seller who attached the goods before any agreement was reached as to the price of the old goods.<sup>7</sup>

1 See section under chapter on PRICE.

2 *Shealy v. Edwards*, 7 Ala. 175, 181; 49 Am. Rep. 453.

3 See § 70, on EXECUTORY SALES IN GENERAL.

4 Price in general: See preceding chapter on that subject.

5 See under chapter on PRICE.

6 *Shealy v. Edwards*, 73 Ala. 175, 182; 49 Am. Rep. 453; citing, *Valpy v. Gibson*, 4 Com. B. 837; *Macomber v. Parker*, 13 Pick. 175.

7 *Shealy v. Edwards*, 73 Ala. 175; 49 Am. Rep. 453.

§ 90. **Rule of presumption merely.**—*Intention, how gathered.* The question whether a sale is completed, or only executory, where no question arises under the statute of frauds and the rights of creditors do not intervene, is one to be determined from the intent of the parties as gathered from their contract, the situation of the thing sold, and the circumstances surrounding the sale.<sup>1</sup>

*Designated goods.* If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in a deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined.<sup>2</sup>

*Acts to determine price.* But where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them,

where the price is to depend upon the quantity or quality of the goods, the performance of these things in the absence of a contrary intent is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted.<sup>3</sup>

1 *Lingham v. Eggleston*, 27 Mich. 324, 326. And the parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete: *Lingham v. Eggleston*, 27 Mich. 324, 326, 327.

2 *Lingham v. Eggleston*, 27 Mich. 324, 327. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive: *Lingham v. Eggleston*, 27 Mich. 324, 327.

3 *Lingham v. Eggleston*, 27 Mich. 324, 329. See § 87.

§ 91. *Weighing, measuring, etc.—Course of decisions in England.* At one time it was held in England, according to a statement of the course of decisions in that country,<sup>1</sup> that under an agreement to purchase an entire bulk at a specified price, the property did not pass if the whole amount of the purchase-money depended upon an ascertainment by weight or measurement subsequently to be made.<sup>2</sup> This decision was made in favor of an unpaid vendor, and was afterward distinguished, on the ground that the weighing was to be done by the seller;<sup>3</sup> and it was held that the property would pass if such was the intention of the parties, though something was to be done, such as weighing, measuring, or testing the goods to ascertain the contract price, if what remained to be done was to be done by the buyer.<sup>4</sup> Still later,<sup>5</sup> the English courts entirely repudiated this distinction, and held in cases where the weighing was to be done by the seller, the property would pass, if the parties so intended, though the ultimate contract price was to be ascertained by a subsequent weighing,<sup>6</sup> it being said that it is equally clear, in point of principle

and in point of common sense, that there is nothing to prevent a man from passing the property to the thing he proposes to sell and the buyer proposes to buy, although the price remains to be ascertained afterwards.<sup>7</sup> And it is declared<sup>8</sup> that it may now be considered to be the law of the English courts<sup>9</sup> that where the contract price has been paid or advances made on it, the property will pass to the buyer according to the intention of the parties, although something remains to be done by the seller to complete the goods, in conformity with the contract, before they are delivered.<sup>10</sup>

*American view of sufficiency of identification.* In this country the English rules are stated and applied with some diversity.<sup>11</sup> Thus it is sometimes said that the reason why marking, measuring, weighing, etc., are necessary, is that the particular goods may be identified;<sup>12</sup> but that the property passes if the goods are capable of being identified, and by the contract of sale are identified.<sup>13</sup> Accordingly a subsequent weighing or measuring merely to determine the full price at a fixed rate is considered<sup>14</sup> to constitute no obstacle to the passing of property.<sup>15</sup>

*American views of intention and presumption.* So while many of the decisions leave each case to stand on its own special circumstances, with intention of the parties as the criterion to determine whether the title has passed and no strong presumption governing the matter,<sup>16</sup> certain cases allow any presumption on the subject to be readily overcome on the ground of a mutual intent to the contrary, express or implied, where the goods, though not yet weighed or measured, were otherwise ready for delivery,<sup>17</sup> especially if payment of the price had already been made or arranged between the parties.<sup>18</sup>

*Unpaid price as factor.* And many of the cases turn on the unfulfilled condition precedent<sup>19</sup> of paying the

price before a title shall vest in the buyer,<sup>20</sup> rather than the want of weighing, measuring, or putting the goods into a deliverable state.<sup>21</sup>

*Presumptive postponement of change of ownership.* But other cases are decided on the principle that weighing and measuring with the seller's concurrence postpones presumptively the change of ownership,<sup>22</sup> as where wood was sold at so much per cord, and a subsequent measurement was part of the bargain, but while the parties were disputing as between "running measure" or "solid cords," the wood floated away and was lost.<sup>23</sup>

1 Hurff v. Hires, 40 N. J. L. 581 ; 29 Am. Rep. 282, 285.

2 Hanson v. Meyer, 6 East, 614 ; Langdell's Cases on Sales, 639.

3 Turley v. Bates, 2 Hurl. & C. 200 ; Langdell's Cases on Sales, 692.

4 Turley v. Bates, 2 Hurl. & C. 200 ; Langdell's Cases on Sales, 692. This distinction was adopted in Boswell v. Green, 1 Dutch, 390.

5 According to Hurff v. Hires, 40 N. J. L. 581 ; 29 Am. Rep. 282, 286.

6 See citations in next note.

7 Martineau v. Kitching, Law R. 7 Q. B. 436 ; Castle v. Playford, Law R. 7 Ex. 98.

8 Hurff v. Hires, 40 N. J. L. 581 ; 29 Am. Rep. 282, 286.

9 See citations in next note.

10 Young v. Matthews, Law R. 2 Com. P. 127 ; Langdell's Cases on Sales, 875 ; Langton v. Waring, 13 Com. B. N. S. 315.

11 2 Schouler on Personal Property, § 250.

12 Arnold v. Delano, 4 Cush. 40 ; 50 Am. Dec. 754, 758. For if ten barrels of oil are sold, lying in a tank of thirty barrels, the buyer can identify no part of it until it is measured : Arnold v. Delano, 4 Cush. 40. And so if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation : Arnold v. Delano, 4 Cush. 40.

13 Arnold v. Delano, 4 Cush. 40 ; 50 Am. Dec. 754, 758.

14 2 Schouler on Personal Property, § 250, citing cases in next note.

15 Crofoot v. Bennett, 2 Comst. 258 ; Langdell's Cases on Sales, 772 ; Riddle v. Varnum, 20 Pick. 280 ; Southwestern Freight Co. v. Stanard, 44 Mo. 71 ; Adams Mining Co. v. Senter, 26 Mich. 73.

16 See section on SPECIAL CIRCUMSTANCES.

17 See citations in next note.

18 See Riddle v. Varnum, 20 Pick. 280 ; Fitch v. Burk, 38 Vt. 683 ; Groat v. Gile, 51 N. Y. 431 ; Boswell v. Green, 1 Dutch. 390 ; Cummins v. Griggs, 2 Duval, 87 ; Brown v. Child, 2 Duval, 314 ; all so cited, 2 Schouler on Personal Property, § 25. "

19 Conditions precedent : See under chapter on CONDITIONAL SALES.

20 2 Schouler on Personal Property, § 250.

21 Putting into deliverable state : See previous section on that subject.

22 *Gibbs v. Benjamin*, 45 Vt. 124 ; *Fuller v. Bean*, 34 N. H. 290 ; *Wittowsky v. Wasson*, 71 N. C. 451 ; *Bailey v. Long*, 24 Kan. 90 ; *Jones v. Pearce*, 25 Ark. 545 ; *Frost v. Woodruff*, 54 Ill. 155 ; *Lingham v. Eggleston*, 27 Mich. 324.

23 *Gibbs v. Benjamin*, 45 Vt. 124 ; 2 Schouler on Personal Property, § 250. And see *Nesbitt v. Burry*, 25 Pa. St. 208.

### § 92. Intention to pass title. — *To unweighed fire-clay.*

The intention of the parties must be looked at in every case ;<sup>1</sup> and effect will be given thereto on a sale of a heap of fire-clay, where the parties have made it sufficiently clear that it was their intention that the property in the whole heap should pass, notwithstanding the clay was to be weighed at the machine of a third party.<sup>2</sup>

*To unfinished bricks.* So the well-known general rule that the property does not pass to the buyer while anything remains to be done by the seller, either to complete the goods or to ascertain the price, has been held inapplicable where the intention of the parties was considered to be that the property in bricks should pass, whether finished or not.<sup>3</sup>

*To cotton-waste not fully weighed.* And where cotton spinners agreed to purchase four stacks of cotton-waste in the warehouse of another spinner, and subsequently had the waste packed into eighty-one sacks, and twenty-one sacks were afterwards weighed and taken to the buyers' premises, but were returned the same day by the buyers on account of objection to the quality, and left loaded on a cart outside the seller's warehouse, to which they were removed by the seller to prevent them from spoiling, it seemed to be considered that the property had passed, though a portion of the sacks had not been weighed, in view of the finding of the jury that the contract was to buy four stacks of cotton-waste specifically agreed on, more or less, for better or for worse.<sup>4</sup>

1 *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 699. In determining whether the parties have agreed that the sale should not be complete, and the title should not pass before something was done to ascertain the price, the question must always be, what was the intention of the parties in this respect, which is, of course, to be collected from the terms of the contract: *Logan v. Le Mesurier*, 6 Moore, P. C. C. 116 ; *Langdell's Cases on Sales*, 681, 690.

2 *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 699 ; citing, also, *Hinde v. Whitehouse*, 7 East, 558 ; *Langdell's Cases on Sales*, 102, 109.

3 *Young v. Matthews*, Law R. 2 Com. P. 127 ; *Langdell's Cases on Sales*, 875, 876.

4 *Kershaw v. Ogden*, 3 Hurl. & C. 717 ; *Langdell's Cases on Sales*, 700, 702 ; following, *Turley v. Bates*, 2 Hurl. & C. 200 ; *Langdell's Cases on Sales*, 692, 699.

§ 93. **Special circumstances.**—*Govern while intention criterion.* It has been declared that so long as courts permit intention to enter into the determination of questions such as those concerning the transfer of title to specific chattels, so long will cases be left to be determined by their own peculiar facts and circumstances.<sup>1</sup>

*Absence of strong presumption.* And it has been pointed out that the tendency of many of the American cases is to let each case go upon its own special basis, upon consideration of the proof and upon the criterion of the intention of the parties,<sup>2</sup> without any very strong presumption for or against the transfer of title.<sup>3</sup>

1 *Halterline v. Rice*, 62 Barb. 597, 598.

2 See 2 Schouler *Personal Property*, § 250, citing cases next given.

3 See *Hyde v. Lathrop*, 3 Keyes, 497 ; *Groat v. Gile*, 51 N. Y. 431 ; *Hutchinson v. Hunter*, 7 Pa. St. 140 ; *Marble v. Moore*, 102 Mass. 443 ; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71.

§ 94. **Acts to be done after delivery.**—*Delivery as indicative of intent to vest title.*—The most important fact indicative of an intent that the title shall pass is generally that of delivery.<sup>1</sup> And if the goods are completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards.<sup>2</sup>

*Acts regarded as for adjustment of price.* Thus it is declared that where the goods are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, or measuring, or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price.<sup>3</sup>

*Broader statement of rule.* More broadly, in some respects, it is stated that the general rule against transfer of title until performance of an act stipulated to be done by the seller will not prevail where, by the terms of the agreement, the title is to vest immediately in the buyer, notwithstanding something remains to be done to the goods by the seller after delivery.<sup>4</sup>

*Constructive and actual delivery.* So the rule that the property does not pass when anything remains to be done has been said to apply only to cases of constructive delivery and constructive possession, and not to cases where there is an actual delivery.<sup>5</sup>

1 *Lingham v. Eggleston*, 27 Mich. 324, 328. And see *Shealy v. Edwards*, 73 Ala. 175, 181; 49 Am. Rep. 453.

2 *Lingham v. Eggleston*, 27 Mich. 324, 328

3 *Macomber v. Parker*, 13 Pick. 175, 183. So that the sale would be as complete as a sale upon credit, before the actual payment of the price: *Macomber v. Parker*, 13 Pick. 175, 183; quoted, *Messer v. Woodman*, 22 N. H. 172, 180; 53 Am. Dec. 416.

4 See *Foster v. Ropes*, 111 Mass. 10, 15.

5 See *Sumner v. Hamlet*, 12 Pick. 76, 83; *Kelsea v. Haines*, 41 N. H. 246, 254. Compare *Orcutt v. Nelson*, 1 Gray, 536, 543.

§ 95. *Duty and agreement to deliver.*—*Duty of seller or of buyer as affecting state of goods.* It is sometimes the duty of the seller, under a contract of sale, to deliver the goods, and sometimes the duty of the buyer to come and take them;<sup>1</sup> so that in one transaction the seller might have to put his goods in a deliverable state and then deliver, while in another he needs only to

have the goods in condition for delivery, and then give the buyer notice to come and take them.<sup>2</sup>

*Special undertaking to deliver.* And a special undertaking, on the seller's part, to convey the purchased goods to a certain point for the buyer's convenience, is not inconsistent with the previous transfer of ownership<sup>3</sup> by mutual consent.<sup>4</sup>

*Illustrations.* Thus, where on a sale of lumber then in the vendor's yard, the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, it was held that this act to be done by the vendor did not prevent the passing of the title, and the risk of loss by fire to the purchaser by a sale otherwise complete.<sup>5</sup> And a survey of a large quantity of logs landed on a stream preparatory to driving by a person mutually agreed upon by the parties to a sale, and the vendor's putting the purchaser's mark on such logs as they were landed, has been held to constitute a sufficient delivery to pass the title, even as against subsequent purchasers, although by the terms of the contract of sale the vendor was bound to deliver the logs at a specified place many miles below the landing.<sup>6</sup>

1 2 Schouler on Personal Property, § 254, whence next paragraph also derived.

2 Compare *Logan v. Le Mesurier*, 6 Moore P. C. C. 116; *Langdell's Cases on Sales*, 681, with following cases: *Waldron v. Chase*, 37 Me. 414; *Whitcomb v. Whitney*, 24 Mich. 486; *Bond v. Greenwald*, 4 Heisk. 453; *Martineau v. Kitching*, Law R. 7 Q. B. 436; 2 Eng. Rep. 539.

3 2 Schouler on Personal Property, § 254; citing cases in next note.

4 See *Dyer v. Libby*, 61 Ma. 45. Weighing and marking the goods with the purchaser's name are always regarded as very significant facts bearing on a delivery: *Beiley v. Long*, 24 Kan. 90.

5 *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 709.

6 *Bethel Steam Mill Co. v. Brown*, 57 Me. 9.

§ 96. *Effect of delivery.*—*Presumption of finality of transfer.*—Wherever the goods are actually delivered,



it is regarded as reasonable to presume that the parties intended this as the final act of transfer,<sup>1</sup> save so far as the question of payment as a condition precedent may arise,<sup>2</sup> and that any subsequent acts of weighing or measuring must have had reference to the buyer's convenience, or to an adjustment of the total price which was by mutual agreement deferred to the vesting of property in the buyer.<sup>3</sup>

*By whom act to be done after delivery.* And it has been distinctly held, though upon proof, not presumption, that the property in the goods may pass, even though something remains to be done to them by the seller after their delivery,<sup>4</sup> while it is considered that the presumption of a completed transfer of property must be far stronger where miscellaneous acts subsequent to delivery are to be performed solely by the buyer, or on his behalf, and not on the sellers.<sup>5</sup>

*Delivery not conclusive to show vesting of title.* Yet while delivery is usually the most significant fact to prove the transfer of title,<sup>6</sup> it is not conclusive,<sup>7</sup> for there may be either an express or an implied contract of the parties to the contrary.<sup>8</sup>

1 2 Schouler on Personal Property, § 254, citing cases given in note after next.

2 See section under CONDITIONAL SALES.

3 See *Riddle v. Varnum*, 20 Pick. 230; *Odell v. Boston & Marine R. R.* 109 Mass. 50; *Kelsea v. Haines*, 41 N. H. 247, 254; *Cushman v. Holyoke*, 34 Me. 289; *Cunningham v. Ashbrook*, 20 Mo. 553; *Burr v. Williams*, 23 Ark. 244; *King v. Jarman*, 35 Ark. 190. Delivery and acceptance of an absolute bill of sale of the goods favors the presumption that the title has passed, though something may remain to be done to the goods, such as weighing to fix the exact price at a rate already agreed upon: *Shepard v. Lynch*, 26 Kan. 377.

4 *Greaves v. Hepke*, 2 Barn. & Ald. 131; *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; *Ross's Leading Cases*, 218.

5 2 Schouler on Personal Property, § 254, whence cases in last note derived.

6 See *Shealy v. Edwards*, 73 Ala. 175, 181; 49 Am. Rep. 453; *Lingham v. Eggleston*, 27 Mich. 324, 328.

7 2 Schouler on Personal Property, § 254.

8 *Wilkinson v. Holiday*, 33 Mich. 386.

§ 97. **Assumption of risk by acceptance.**—*In general.* By accepting the specific chattel as his own, under a delivery, the buyer might well be supposed to have waived all claim to a delayed transfer of property arising out of further acts which remain to be performed,<sup>1</sup> and a like reasoning might apply for shifting the presumptions, in case the risks of delivery had been specially assumed by the buyer.<sup>2</sup>

*Express undertaking.* Whether it be conceived that the property had passed or not, in the latter instance it is clearly decided that the buyer is liable for destruction of the goods caused through no fault of the seller, and is bound to the payment of the agreed price, wherever he has specially contracted to bear the risk of delivery,<sup>3</sup> for this would be but enforcing a fulfillment of his own express undertaking.<sup>4</sup>

1 See *Burr v. Williams*, 23 Ark. 244.

2 2 Schouler on Personal Property, § 254.

3 See section on ASSUMPTION OF RISK, in chapter on TRANSFER OF TITLE.

4 2 Schouler on Personal Property, § 254; citing, *Martineau v. Kitching*, Law R. 7 Q. B. 436; 2 Eng. Rep. 539; *Castle v. Playford*, Law R. 5 Ex. 165; Law R. 7 Ex. 98; 1 Eng. Rep. 204.



## CHAPTER IX.

## SALES OF UNSPECIFIED CHATTELS.

- § 98. Need of specification.
- § 99. Object to be effected.
- § 100. Identification.
- § 101. Warehouse receipt for undesignated goods.
- § 102. Delivery of unidentified goods.
- § 103. Selection and separation.
- § 104. When trover not maintainable.
- § 105. *Quasi* cotenancy.
- § 106. Estoppel of custodian.
- § 107. Intention and indications thereof.
- § 108. Weighing or separation.
- § 109. Distinguishing from mass.
- § 110. No selection necessary where mass uniform.
- § 111. Intention as criterion.
- § 112. Separation from uniform mass.
- § 113. Illustrative cases.

§ 96. **Need of specification.**—*For present sale of chattels not specific.* Goods existing as a part of a larger mass, from which they must be separated by counting, weighing, or measuring, or which are hereafter to be procured and supplied to the buyer, or which are to be manufactured for his use, are not ordinarily considered the proper subjects of a common-law sale, presently passing the title, but only of an executory contract for the future sale and delivery of personal property.<sup>1</sup> And under a contract of sale of chattels not specific, it is generally indispensable, before there can be an actual transfer of property, to make the subject-matter specific, or in other words, to appropriate particular chattels to the contract.<sup>2</sup>

*Illustrative case.* Thus, it has been held that a suit is not maintainable for the price of eight thousand bushels

of corn sold under a written contract which did not specify what corn was meant, as no title had passed for want of specification.<sup>3</sup>

*Statement of fundamental rule.* The fundamental rule applicable is said to be that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale.<sup>4</sup> The goods must be ascertained, designated, and as generally held, separated from the stock or quantity with which they are mixed, before the property can pass.<sup>5</sup>

*Presumption as to goods not separated, etc.* Until this is done, the presumption is asserted to remain that the agreement, still executory, contemplates a postponement in the mean while of the transfer of property;<sup>6</sup> and it is declared evident that trover or replevin cannot be maintained for goods which are not as yet identified, but exist only as part of a mass awaiting separation.<sup>7</sup>

*Reason of rule.* The reason of the rule requiring separation and identification of goods mingled with others is stated to be that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained.<sup>8</sup> For the law is declared to know no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards.<sup>9</sup> Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description;<sup>10</sup> and since the vendor would fulfill his part of the contract by furnishing any parcel of goods answering that description, it is laid down as clear that there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold.<sup>11</sup>

1 See *Cunningham v. Ashbrook*, 20 Mo. 553, 556.

2 2 Schouler on Personal Property, § 256. Like effect: *Blackburn on Sales*, 122, 123; *Bennett's Benjamin on Sales*, § 352, citing following American cases: *Warren v. Buckminster*, 24 N. H. 336; *Browning v. Hamilton*, 42 Ala. 484; *Indianapolis R. W. Co. v. Maguire*, 62 Ind. 140; *Smyth v. Exec'rs of Ward*, 46 Iowa, 339; *Dunning v. Gordon*, 4 Up. Can. Q. B. 399; *Middlebrook v. Thompson*, 19 Up. Can. Q. B. 307; *McDougall v. Elliott*, 20 Up. Can. Q. B. 29; *Cox v. Jones*, 21 Up. Can. Q. B. 81; *Robertson v. Strickland*, 28 Up. Can. Q. B. 221; *Pew v. Lawrence*, 27 Up. Can. C. P. 402; *Levey v. Loundes*, 2 Low. Can. 257.

3 *Ormsby v. Machin*, 20 Ohio St. 295, 306. And that it was error to permit the seller to prove that the corn meant was a lot stored in his bins: *Ormsby v. Machin*, 20 Ohio St. 295, 306.

4 *Hutchinson v. Hunter*, 7 Pa. St. 140, 141. The property cannot pass until there be a specific identification, in some way, of the particular goods which the party bargains for: See *Golder v. Ogden*, 15 Pa. St. 528, 533; *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783, 786, 787.

5 *Hutchinson v. Hunter*, 7 Pa. St. 140, 145. And see *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783, 786; *Crofoot v. Bennett*, 2 Comst. 258; *Langdell's Cases on Sales*, 772, 773; 2 Kent Com. 496; *Warren v. Buckminster*, 24 N. H. 336, 342; *Brewer v. Salisbury*, 9 Barb. 511, 514.

6 2 Schouler on Personal Property, § 256. If goods are sold by number, weight, or measure, the sale is *prima facie* not complete until their quantity is ascertained, and if they are mixed with others, not until they are separated and designated: *Fuller v. Bean*, 34 N. H. 290, 300.

7 2 Schouler on Personal Property, § 256; citing, *Austen v. Craven*, 4 Taunt. 644; *Langdell's Cases on Sales*, 741, 744; *Gillett v. Hill*, 2 Crompt. & M. 530; *Langdell's Cases on Sales*, 755, 758; *Morrison v. Dingley*, 63 Me. 553; *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783; *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282. So it is said that on a sale of merchandise or chattels, if anything is necessary to individualize the thing sold, such as weighing, measuring, counting, or separating from a bulk, the title does not pass until this is done, and the purchaser cannot maintain detinue or trover: *Mobile Sav. Bank v. Fry*, 69 Ala. 348, 350; citing, *Magee v. Billingsly*, 3 Ala. 679; *Tucker v. Henderson*, 63 Ala. 280; sustained, *Fry v. Mobile Sav. Bank*, 75 Ala. 473, 474.

8 *Crofoot v. Bennett*, 2 Comst. 258; *Langdell's Cases on Sales*, 772, 773.

9 *Golder v. Ogden*, 15 Pa. St. 528. See *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783, 787.

10 See citations in next note.

11 *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783, 787; quoting, *Blackburn on Sales*, 122. Compare *Campbell on Sales*, 227; *Hubler v. Gaston*, 9 Or. 66, 70; 42 Am. Rep. 794.

§ 99. Object to be effected. — *Identified goods with price ascertained.* If the goods sold are clearly identified, then it is declared the title will pass, although it may be necessary to number, weigh, or measure the goods in

order to ascertain what would be the price of the whole at a price agreed upon between the parties.<sup>1</sup>

*Specification or computation of value.* The distinction in all such cases is said to depend not so much upon what is done, as upon the object to be effected by it; and if that is specification, the property is not changed, but if it is merely to ascertain the total value at designated rates, the change of title is effected.<sup>2</sup>

1 Crofoot v. Bennett, 2 N. Y. 258, 259; Langdell's Cases on Sales, 772. Thus the sale is valid and complete if a flock of sheep is sold at so much per head, and it is agreed that they shall be counted after the sale in order to determine the price of the whole: Crofoot v. Bennett, 2 N. Y. 258, 259. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated and their identity thus ascertained and determined: Crofoot v. Bennett, 2 N. Y. 258, 259; quoted, Brewer v. Salisbury, 9 Barb. 511, 515; Hyde v. Lathrop, 2 Abb. N. Y. App. 436, 439, 440.

2 Crofoot v. Bennett, 2 N. Y. 258, 260; Langdell's Cases on Sales, 772; quoted, Brewer v. Salisbury, 9 Barb. 511, 515. See Groat v. Gile, 51 N. Y. 431, 437.

§ 100. *Identification.—Need and requisites.* The authorities are said to be nearly uniform in holding that the legal title to personalty does not pass by a contract of sale where the identity of the property contracted to be sold is not ascertained by the contract, nor capable of identification by parol evidence.<sup>1</sup> And if the property which is the subject of sale is an unidentified part of a species which is capable of separation, its identification is not such as the law requires in order to transfer the legal title by a sale.<sup>2</sup>

*Without separation, etc.* But goods sold may be sufficiently identified to pass the title though they are not separated, as where there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers.<sup>3</sup> So, according to some of the cases, upon a sale of a specified quantity of grain, its separation from a mass, undistinguishable in quality or value, in which it is included,

is not necessary to pass the title,<sup>4</sup> when the intention to do so is otherwise clearly manifested.<sup>5</sup>

*Pointing out or marking.* Pointing out animals to remain in the pasture with others, has been held sufficient to transfer the title thereto.<sup>6</sup> There has been held, however, to be no sufficient identification of a portion of iron not inspected by the buyer, where all that ordered was manufactured and piled for the buyer but not marked.<sup>7</sup>

1 *Browning v. Hamilton*, 42 Ala. 484, 485. And see *First Nat. Bank v. Crowley*, 24 Mich. 496, 497; distinguishing *Whitcomb v. Whitney*, 24 Mich. 486, 492.

2 *Browning v. Hamilton*, 42 Ala. 484, 485. But until it is separated from the bulk the title remains with the seller, and if the property is lost, he must, as a general rule, bear the loss: *Browning v. Hamilton*, 486. When separated, however, the title passes unless there is some stipulation which prevents; and if lost, though possession is with the seller, the loss falls on the buyer, unless it is occasioned by some illegal act or omission of the seller: *Browning v. Hamilton*, 42 Ala. 486.

3 *Arnold v. Delano*, 4 Cush. 33, 40; 50 Am. Dec. 754, 758. And see *Ropes v. Lane*, 9 Allen, 502.

4 *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282.

5 *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775; *Russell v. Carrington*, 42 N. Y. 118, 122; 1 Am. Rep. 498. But see *contra*, *Commercial Nat. Bank v. Gillette*, 90 Ind. 263; 46 Am. Rep. 222.

6 *Webster v. Anderson*, 42 Mich. 554.

7 *First Nat. Bank v. Crowley*, 24 Mich. 492, 496. And see *Hahn v. Fredericks*, 30 Mich. 224, 226. Measurement deemed necessary to complete identification: *Crapo v. Seybold*, 35 Mich. 169.

§ 101. *Warehouse receipt for undesignated goods.*—*At common law.* The indorsement of a warehouse receipt, and its delivery, operated to vest the purchaser with the title and possession at common law;<sup>1</sup> but if not for a specific chattel, and the property it represented was a part of a large bulk or mass of articles that required separation, no title passed until the separation was had.<sup>2</sup>

*Under statute.* And the doctrine of the common law as to the identification of the property is held not to be changed by a statute rendering warehouse receipts negotiable, and constituting them the symbolic representative of the property, etc.,<sup>3</sup> but on the contrary it is

said to be maintained by a provision in such statute that such receipt shall set forth the quality, quantity, kind, and description of the property which shall be designated by some mark.<sup>4</sup> But in Massachusetts the statute provides that the warehouseman's receipt for any portion of grain or other property stored in a public warehouse in such a manner that different lots or parcels are mixed together so that the identity of the same cannot be preserved, shall be deemed a valid title to so much thereof as is designated in said receipt, without regard to any separation or identification.<sup>5</sup>

1 *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555 ; 29 Am. Rep. 418, 422. And see *Newcomb v. Cabell*, 10 Bush, 460, 469, 470.

2 *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555 ; 29 Am. Rep. 418, 422.

3 See *Newcomb v. Cabell*, 10 Bush, 460, 470.

4 *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555 ; 29 Am. Rep. 418, 422. Nor is the fact that hams are branded with the usual or known trade-mark of a firm, found on all the hams in the warehouse, a sufficient mark or distinguishing feature to enable the party to identify the property: *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555. Compare on latter point, *Scudder v. Worster*, 11 Cush. 573 ; *Langdell's Cases on Sales*, 783. And see generally as to need of specification, *May v. Hoaglan*, 9 Bush, 171, 173. (Contract construed as covenant to furnish eight barrels of whiskey in the future.) Insurable interest in unseparated wheat held to pass under Canadian statute: *Box v. Provincial Ins. Co.* 13 Grant (Ont.) 280.

5 Mass. Pub. Stats. ch. 72, § 7. Warehouse receipts for grain generally: See Rev. Stats. Ill. 1880, ch. 114, § 120, et seq.; *Bailey v. Bensley*, 87 Ill. 556 ; *Broadwell v. Howard*, 77 Ill. 305 ; *Young v. Miles*, 20 Wis. 615 ; S. C. 23 Wis. 643. Analysis of enactments relating to warehousemen and their receipts: *Stims Am. Stat. Law*, pp. 517-519, §§ 4370-4372.

§ 102. *Delivery of unidentified goods.*—*Does not determine intention.* Where goods are sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, as already stated,<sup>1</sup> until the specific property is separated and identified.<sup>2</sup> And though the question of the transfer of title and risk is one of intention,<sup>3</sup> yet the intention is to be ascertained, not from the single fact of delivery, but from all the language and conduct of the parties.<sup>4</sup>



*Liability for loss.* Hence, where under a contract to sell one hundred and fifty railroad ties, two hundred and fifty-two were delivered, but it never was ascertained which of these were for the purchaser receiving them, and which for another party, and some of them were burned, it has been held that the liability for the loss of those destroyed cannot fall upon such purchaser.<sup>5</sup>

1 See § 76, on GOODS MINGLED WITH OTHERS.

2 *Hutchinson v. Grand Trunk Railway*, 59 N. H. 487, 489; citing, 2 Kent Com. 4-6; *Davis v. Hill*, 3 N. H. 382; *Messer v. Woodman*, 22 N. H. 172; *Warren v. Buckminster*, 24 N. H. 337; *Fuller v. Bean*, 34 N. H. 200; *Ockington v. Rickey*, 41 N. H. 275; *Bailey v. Smith*, 43 N. H. 141; *Prescott v. Locke*, 51 N. H. 94, 99; *Jenness v. Wendell*, 51 N. H. 63, 69; *Smart v. Batchelder*, 57 N. H. 140; *Macomber v. Parker*, 13 Pick. 175; *Riddle v. Varnum*, 20 Pick. 280; *Foster v. Ropes*, 111 Mass. 10.

3 See § 71, on INTENTION TO TRANSFER TITLE; also under chapter on TRANSFER OF TITLE.

4 *Hutchinson v. Grand Trunk Railway*, 59 N. H. 487, 489; citing, *Fuller v. Bean*, 34 N. H. 303; *Foster v. Ropes*, 111 Mass. 10, 16.

5 *Hutchinson v. Grand Trunk Railway*, 59 N. H. 487, 489.

§ 103. *Selection and separation.*—*For identification, prerequisite to transfer of title.* The general rule is that where the identity of the chattels contracted for is not immediately ascertainable from the contract, but requires further specific acts, the property does not pass to the buyer, but remains in the seller until identification has taken place through suitable acts of selection and separation.<sup>1</sup>

*Applications of doctrine.* And this doctrine as to unspecified goods has been applied to a contract with refiners for a certain quantity of a specified quality of sugars, so that trover was held not maintainable because any sugars of the required quality would have satisfied the contract;<sup>2</sup> and to a purchase of a number of tons of linseed oil from one who at the time was possessed of large quantities of oil, lying in several different cisterns, in different warehouses.<sup>3</sup> The same rule has been considered applicable to a sale of ten tons of Riga flax,

which required to be separated, by weight, from a larger mass of eighteen tons, while it might have been necessary to break open some of the mats in which the article is usually imported in order to make up the stipulated quantity if the weight fell short.<sup>4</sup> So there can be no recovery where replevin is brought for a certain number of barrels of pork, bargained and sold, and still remaining in the vendor's cellar, and parcel of a larger quantity of similar brand.<sup>5</sup>

*Further illustrations.* And the general principle has been deemed applicable where a bargain is for the whole of a lot, with a reservation to be made by the seller;<sup>6</sup> or for so many bushels out of a larger mass kept in store,<sup>7</sup> or for ungathered vegetables or fruit;<sup>8</sup> or for two thousand telegraph poles, which must be selected from a lot containing some twenty-one hundred;<sup>9</sup> or for ores to be hereafter delivered from a mine or a heap;<sup>10</sup> or for lumber to be cut and sawed or piled.<sup>11</sup>

*Animals not selected from flock.* So where there was a bargain for fifteen of the best sheep of a flock, but they were not selected, it was held that the sale was incomplete, and the property did not pass until the sheep were selected and designated by marking or otherwise, or separated from the flock.<sup>12</sup>

*Possession taken for purpose of separation.* But in the case of a sale of part of an entire mass of goods, such as coal, brick, flour, and grain, if the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to the part passes to the purchaser, and he may retain that whole until he has had a sufficient time and opportunity to separate and take the part belonging to him.<sup>13</sup>

1 2 Schouler on Personal Property, § 257, stating succeeding illustrations in paragraph. If a party agrees to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part

of the whole quantity such party has agreed to deliver until a selection is made, for there is no individuality until it is divided: *Gillett v. Hill*, 2 Crompt. & M. 523; *Langdell's Cases on Sales*, 755, 758. See *Ferguson v. Northern Bank*, 14 Bush, 555; 29 Am. Rep. 418, 423.

2 *Austen v. Craven*, 4 Taunt. 644; *Langdell's Cases on Sales*, 741, 744; noted, *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775, 780; *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 232, 284; citing, also, *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942.

3 *White v. Wilks*, 5 Taunt. 176; *Langdell's Cases on Sales*, 744, 745. But compare *contra*, *Whitehouse v. Frost*, 12 East, 614; *Langdell's Cases on Sales*, 734, 737. And see *Wallace v. Breeds*, 13 East, 522; *Langdell's Cases on Sales*, 739, 741; *Foot v. Marsh*, 51 N. Y. 288; *Halderman v. Duncan*, 51 Pa. St. 63; *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775, 780.

4 *Bush v. Davis*, 2 Maule & S. 397; *Langdell's Cases on Sales*, 747, 749. So of hemp to be weighed off and separated: *Shepley v. Davis*, 5 Taunt. 617; *Langdell's Cases on Sales*, 752, 755.

5 *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783.

6 *Block v. Maas*, 65 Ala. 211.

7 *Waldo v. Belcher*, 11 Ired. 609.

8 *Bailey v. Long*, 24 Kan. 90.

9 *Bailey v. Smith*, 43 N. H. 141.

10 *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *Reeder v. Machen*, 57 Md. 56. And see *Hutchinson v. Hunter*, 7 Pa. St. 140; *Golder v. Ogden*, 15 Pa. St. 528; *Warren v. Buckminster*, 24 N. H. 336; *Browning v. Hamilton*, 42 Ala. 484; *Ormsbee v. Machin*, 23 Ohio St. 295; *Ferguson v. Louisville Bank*, 14 Bush, 555; 29 Am. Rep. 418.

11 *Galloway v. Meek*, 54 Wis. 604; *Pfister v. Bird*, 43 Mich. 14; *Indianapolis R. v. Maguire*, 62 Ind. 140; *Dougherty v. Haggerty*, 96 Pa. St. 515. See 2 Schouler on Personal Property, § 257, stating illustrations as given in foregoing paragraph.

12 *Warren v. Buckminster*, 24 N. H. 336, 343. Compare in regard to sales of animals: *Groat v. Gile*, 51 N. Y. 431, 437; *Bertelson v. Bowers*, 81 Ind. 512, 513; *McLaughlin v. Platt*, 27 Cal. 451, 463; *Southwell v. Beazley*, 5 Or. 143, 145.

13 *Lamprey v. Sargent*, 58 N. H. 241, 242; citing, *Story on Sales*, 314, n. 3; *Weld v. Cutter*, 2 Gray, 195; *Damon v. Osborne*, 1 Pick. 476.

§ 104. When trover not maintainable.—*Thiny to be done by vendor*. It has been declared that the cases where trover is not the proper form of action may be divided into two classes, one being those in which there has been a sale of goods, and something remains to be done by the vendor, where until that is done the property does not pass to the vendee so as to entitle him to maintain trover.<sup>1</sup>

*Vendor's power of selection*. The other class of cases is where there is a bargain for a certain quantity *ex a*

greater quantity,<sup>2</sup> and there is a power of selection in the vendor to deliver which he thinks fit; and then the right to them does not pass until the vendor has made his selection, and trover is not maintainable before that is done.<sup>3</sup>

1 Gillett v. Hill, 2 Crompt. & M. 530; Langdell's Cases on Sales, 755, 758.

2 See Wallace v. Breeds, 13 East. 522; Langdell's Cases on Sales, 733; Hurff v. Hires, 40 N. J. L. 531; 29 Am. Rep. 232, 239; Ferguson v. Northern Bank of Kentucky, 14 Bush, 555; 20 Am. Rep. 418, 423.

3 Gillett v. Hill, 2 Crompt. & M. 530; Langdell's Cases on Sales, 755, 758. Point raised but overruled that trover would not lie for the conversion of 1969 Spanish dollars, because not distinguished or separated from remaining contents of a parcel of \$4918, transmitted to a consignee for the use of plaintiff: Jackson v. Anderson, 4 Taunt. 24; as stated, Scudder v. Worster, 11 Cush. 573; Langdell's Cases on Sales, 783, 785.

§ 105. *Quasi cotenancy.*— *Apparent exception to general rule.* There is an apparent exception to the general rule if an undivided part of a specified bulk be the subject of the sale.<sup>1</sup>

*No separation necessary.* For in that case the buyer may become *quasi* tenant in common with the seller of the entire bulk,<sup>2</sup> if such be the intention of the parties,<sup>3</sup> and of course no separation is necessary to vest the title in the buyer.<sup>4</sup>

1 Langdell's Cases on Sales, 1027.

2 See Kimberly v. Patchin, 19 N. Y. 330; Langdell's Cases on Sales, 775, 782.

3 Intention and indications thereof: § 107.

4 Kimberly v. Patchin, 19 N. Y. 330; Langdell's Cases on Sales, 775; Cushing v. Breed, 14 Allen, 376; Langdell's Cases on Sales, 788, 1028. And see Chapman v. Shepard, 39 Conn. 413; Hoyt v. Hartford Fire Ins. Co. 26 Hun, 416, 418. But compare Ferguson v. Northern Bank, 14 Bush, 555; 29 Am. Rep. 418, 424. Deposits in warehouses: See Keeler v. Goodwin, 111 Mass. 490, 491; Dale v. Olmsted, 36 Ill. 150, 154; 41 Ill. 344.

§ 106. *Estoppel of custodian.*— *Warehouseman accepting order for goods.* The principle of estoppel,<sup>1</sup> which had been applied to the case of specified goods,<sup>2</sup> has been extended to the case of goods not specified;<sup>3</sup> and it has been held that when a warehouseman has ac-

cepted an order calling for goods of a given quantity and quality, he will be estopped from saying that he has no such goods in his custody belonging to the holder of the order, and will be liable to an action of trover at the suit of the latter if he refuses to comply with the terms of the order.<sup>4</sup>

*Difficulty in supporting authorities.* But it has been suggested that there seems to be difficulty in supporting upon principle the cases which take this position, because there was no assertion of facts in the orders, and the warehousemen merely promised to comply with the terms of the orders.<sup>5</sup>

1 See generally *Barnard v. Campbell*, 55 N. Y. 456, 463.

2 See *Stonard v. Dunkin*, 2 Camp. 344; *Langdell's Cases on Sales*, 653, 654; *Hawes v. Watson*, 2 Barn. & C. 540; *Langdell's Cases on Sales*, 656, 658; *Gillett v. Hill*, 2 Crompt. & M. 530; *Langdell's Cases on Sales*, 755, 758, 759.

3 See *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282, 289; and citations in next note.

4 *Woodley v. Coventry*, 2 Hurl. & C. 164; *Langdell's Cases on Sales*, 760; *Knights v. Wiffen*, Law R. 5 Q. B. 660; *Langdell's Cases on Sales*, 766, 771.

5 See *Langdell's Cases on Sales*, 1028. Estoppel held inapplicable as doctrine to support action of replevin: *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783, 788.

§ 107. *Intention and indications thereof.* — *Intention overcoming presumption against transfer of title.* It has been stated that there seems to be good authority for asserting that if the parties so intend it, and their mutual intention is made sufficiently manifest, the usual presumption against a change of property may be overcome, even in the case of goods not specific,<sup>1</sup> though it is not always clear whether the ground be that the property has passed, or that the buyer has specially contracted to assume the risks.<sup>2</sup>

*Selection and separation, or separation only.* So there are cases which make a distinction between the sale of goods which require both selection and separation, and

the sale of goods requiring separation only,<sup>3</sup> and consider that in the former class of cases, as an act of special discrimination is requisite, the property should less readily be presumed to have passed than in the latter class.<sup>4</sup>

*Purchaser to make separation after delivery.* And in determining, upon the basis of mutual intention, whose should be the risks, a circumstance not without force is<sup>5</sup> that the purchaser is invested with the right and duty to take the goods, separating for himself.<sup>6</sup>

1 2 Schouler on Personal Property, § 258, whence paragraph derived.

2 See *Watts v. Hardy*, 13 Fla. 523; *Chapman v. Shepard*, 39 Conn. 413; *Waldron v. Chase*, 37 Me. 414; distinguished, *Morrison v. Dingley*, 63 Me. 553; *Carpenter v. Graham*, 42 Mich. 191.

3 Compare *Haldeman v. Duncan*, 51 Pa. St. 66, and *Chapman v. Shepard*, 39 Conn. 413; *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282.

4 2 Schouler on Personal Property, § 258. And the conflicting decisions may be somewhat reconciled by applying the rule of mutual intention with more or less force to overcome a contrary presumption, according as the sale may require separation alone, or separation accompanied by selection: 2 Schouler on Personal Property, § 258.

5 2 Schouler on Personal Property, § 258, whence paragraph derived.

6 See *Foot v. Marsh*, 51 N. Y. 288; explaining, *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775; *Waldron v. Chase*, 37 Me. 414; *Weld v. Cutler*, 2 Gray, 195; *Lamprey v. Sargent*, 53 N. H. 241; *Washburn Iron Co. v. Russell*, 130 Mass. 543. But compare *Haldeman v. Duncan*, 51 Pa. St. 66.

§ 108. *Weighing or separation.*—*For identification, etc.* Where there is an immediate sale of a specific and ascertained chattel, and nothing remains to be done by the vendor, as between him and the vendee, the property in the thing vests in the vendee.<sup>1</sup> But where only a part of the bulk is sold, so that weighing or separation is necessary to determine the identity of the part so sold, or, if the whole of a commodity be sold, but weighing or measuring be necessary to ascertain or compute the price, unless the intention to pass the property be manifest without further act on the part of

the vendor, the act of weighing or measuring is essential to vest the property in the vendee.<sup>2</sup>

*Trover not maintainable without.* And where a sale was made of a large pile of slate, at a certain price per ton, to be paid for as parcels of it should from time to time be taken away, and the purchaser had paid the price of fourteen tons, it was held that he was entitled to have that quantity weighed off and separated for him, but that until such separation he had no property in any specific fourteen tons, and could not maintain trover thereof.<sup>3</sup> So trover has been held not maintainable by a purchaser where a cargo of coal was discharged in an undistinguishable mass upon a wharf, and the removal of the full quantity bought was prevented by the interposition of another purchaser while a portion of the coal remained unweighed upon the wharf.<sup>4</sup> And where the buyer paid for three mows of hay, to be weighed out of a certain mow when he should see fit to move the same, and the hay was taken by a third person, such buyer has been held unable, for want of property, to maintain trover against the third person, as there had been no separation from the general mass.<sup>5</sup>

1 *Reeder v. Machem*, 57 Md. 56; citing, *Dixon v. Yates*, 5 Barn. & Adol. 313, 340; *Ross's Leading Cases*, 55; *Thompson v. R. R. Co.* 28 Md. 404; *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942.

2 *Reeder v. Machem*, 57 Md. 53; citing, *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639; *Bush v. Davis*, 2 Maule & S. 397; *Langdell's Cases on Sales*, 747; *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659; *Shepley v. Davis*, 5 Taunt. 617; *Langdell's Cases on Sales*, 752; *Swanwick v. Sothorn*, 9 Ad. & E. 895; *Langdell's Cases on Sales*, 673; *Golder v. Ogden*, 15 Pa. St. 528; *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783.

3 *Young v. Austin*, 6 Pick. 280, 283; distinguishing, *Damon v. Osborn*, 1 Pick. 476; *Whitehouse v. Frost*, 12 East, 614; *Langdell's Cases on Sales*, 734; followed, *Merrill v. Hunnewell*, 13 Pick. 213, 216; *Stone v. Peacock*, 35 Me. 385, 388.

4 *Morrison v. Dingley*, 63 Me. 553, 556. But delivery held sufficient, according to intention of parties, though whole quantity sold not weighed and severed from the bulk: *Phillips v. Ocmulgee Mills*, 55 Ga. 633, 638. And compare *Cumberland Bone Co. v. Andes Ins. Co.* 64 Me. 466, 469.

5 *Davis v. Hill*, 3 N. H. 382; 14 Am. Dec. 373, 374; followed, *Messer v. Woodman*, 22 N. H. 172, 180; 53 Am. Dec. 241, 247.

§ 109. *Distinguishing from mass.*—*Rule requiring separation.* The long-established rule of the common law,<sup>1</sup> as adopted in England and in many States in this country,<sup>2</sup> is that a sale of personal property constituting a part of a large mass of like property passes no title to the purchaser until it is separated from the mass, or in some other manner designated.<sup>3</sup> This doctrine holds that specific individual goods must be agreed on by the parties,<sup>4</sup> and that it is not enough that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion must be separated from the mass before the sale can be completed.<sup>5</sup>

*Applications of doctrine.* And the doctrine has been applied to a sale of car-wheels in a common mass with others, without separation or designation, which after the execution of the contract were seized as the property of the purchaser.<sup>6</sup> So the title does not presently pass on a purchase of a certain number of bushels of bright, merchantable, white oats, for which payment is then made, when the seller agrees to deliver that quantity and quality of oats, in good sacks, on board the cars when called for.<sup>7</sup>

*When no designation necessary.* Where, however, barrels were alike in size and quality, it has been held that no designation was intended or necessary to distinguish the particular lot sold from those in store.<sup>8</sup> But in order to substitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or maintain replevin for it.<sup>9</sup>



*Mass of uniform character.* And it has been said that the cases in which the title to goods sold, a part of a larger mass, has been held to pass before severance, are confined to those in which the mass itself is ascertained, and of a uniform quality and value,<sup>10</sup> though even in regard to such cases there is a conflict of authority.<sup>11</sup>

1 According to *Com. Nat. Bank v. Gillette*, 90 Ind. 268, 269; 46 Am. Rep. 222.

2 See *Hutchinson v. Hunter*, 7 Pa. St. 140; *Haldeman v. Duncan*, 51 Pa. St. 66; *Fuller v. Bean*, 34 N. H. 290; *Ockington v. Richey*, 41 N. H. 275; *Ropes v. Lane*, 9 Allen, 502; *Woods v. McGee*, 7 Ohio, 467; *Morrison v. Woodley*, 84 Ill. 192; *Bricker v. Hughes*, 4 Ind. 146; *Courtwright v. Leonard*, 11 Iowa, 32; *Ferguson v. Northern Bank*, 14 Bush, 555; 29 Am. Rep. 418; *McLaughlin v. Piatti*, 27 Cal. 463. And consult *Merchants' etc. Bank v. Hibbard*, 48 Mich. 118; 42 Am. Rep. 465. *Contra*, see *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775; distinguished, *Foot v. Marsh*, 51 N. Y. 70; *Higgins v. Del. etc. R. R.* 51 N. Y. 288; 60 N. Y. 553. See, also, *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726.

3 *Com. Nat. Bank v. Gillette*, 90 Ind. 268, 269; 46 Am. Rep. 222. And see *Hubler v. Gaston*, 9 Or. 66, 70; 42 Am. Rep. 794.

4 *Murphy v. State*, 1 Ind. 366.

5 *Murphy v. State*, 1 Ind. 366; *Scott v. King*, 12 Ind. 203. And see *Moffatt v. Green*, 9 Ind. 198; *Lester v. East*, 49 Ind. 588, 594; *Indianapolis etc. Ry. Co. v. Maguire*, 62 Ind. 140; *Bertelson v. Bower*, 81 Ind. 512.

6 *Com. Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222.

7 *Hubler v. Gaston*, 9 Or. 66, 69; 42 Am. Rep. 794. For such contract is for the sale of a certain quantity of goods in general, and cannot be regarded as any more than a contract to supply, on demand, any other oats of like quality or quantity, which construction is inconsistent with an intention to transfer some particular identified oats, and no other, when the oats were sold and the price paid: *Hubler v. Gaston*, 9 Or. 66, 69.

8 *Carpenter v. Graham*, 42 Mich. 191, 193.

9 *Foot v. Marsh*, 51 N. Y. 288, 293.

10 See *Morrison v. Dingley*, 63 Me. 553, 556.

11 See § 112, on SEPARATION FROM UNIFORM MASS.

§ 110. No selection necessary where mass uniform.—*Need of selection as basis of requirement of separation.* The rule of law that upon the sale of a portion of a larger bulk, the contract remains executory until the portion sold is severed and separated for the purchaser from the mass, is sometimes said to prevail only wherever

the nature of the article is such that a selection is required, whether expressly provided for or not by the terms of the contract.<sup>1</sup>

*No selection or separation of uniform mass.* But where the subject-matter of the sale is part of an ascertained mass of uniform quality and value, no selection is required, and in this class of cases it is said to be affirmed by many authorities that severance is not, as matter of law, necessary in order to vest in the vendee the legal title to the part sold.<sup>2</sup>

1 *Chapman v. Shepard*, 39 Conn. 413, 420. And if the articles differ from each other in quantity, or quality, or value, the necessity of a selection is clearly implied: *Chapman v. Shepard*, 39 Conn. 413, 420. In all such cases the subject-matter of the sale cannot be identified until severance, which is necessary in order that such subject-matter may be made certain and definite: *Chapman v. Shepard*, 39 Conn. 413, 420, 421.

2 *Chapman v. Shepard*, 39 Conn. 413, 421. And that the title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title: *Chapman v. Shepard*, 39 Conn. 413, 421; approving, *Whitehouse v. Frost*, 12 East, 614; *Langdell's Cases on Sales*, 734; *Ross's Leading Cases*, 6; and reviewing principal American cases, more fully cited in § 112, on SEPARATION FROM UNIFORM MASS.

§ 111. *Intention as criterion.*—*Slight circumstances utilized.* There is great difficulty in determining under what circumstances the parties shall be considered as having evinced an intention that property in the subject-matter of sale should pass from the vendor to the purchaser.<sup>1</sup> And where the rights of unpaid vendors are concerned, courts have laid hold of slight circumstances to retain the property in such vendors until the purchase-money be paid.<sup>2</sup>

*Supplying goods of particular description.* Another class of cases where the title is held not to pass, comprises those in which the contract is to supply goods of a particular description, and would be fulfilled by furnishing any goods of the stipulated quality and quantity.<sup>3</sup>

*Advantage derived from selection.* So there is still another class of cases where the sale is completed in all respects, except that the bulk from which the property purchased is to be separated is not identical in kind or uniform in value, and some advantage may be derived from the privilege of selection.<sup>4</sup>

*Presumption against intention to pass title.* In cases like these it is considered that the title does not pass immediately upon the terms of the contract being agreed upon, as the circumstances are such, and of such weight, that it is presumed that it was not the intention of the parties that the sale should be completed.<sup>5</sup>

*When separation mere ministerial act.* But a different case is deemed to be presented where nothing remained to be ascertained or adjusted to determine what the rights of the parties were: where the property had been inspected and approved, and was left with the vendor for the purchaser's convenience; where the mass from which the quantity alone was to be separated was identical in kind, and uniform in value, so that the privilege of selection would not confer any advantage upon either party; and when nothing was left undone by the parties, except measuring out the quantity purchased from any part of the whole bulk.<sup>6</sup>

1 Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 282, 284.

2 See case just cited, relying upon *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639; *Wallace v. Breeds*, 13 East, 522; *Langdell's Cases on Sales*, 739; *Shepley v. Davis*, 5 Taunt. 616; *Langdell's Cases on Sales*, 752; *Bush v. Davis*, 2 Maule & S. 397; *Langdell's Cases on Sales*, 747; *Swanwick v. Sothorn*, 9 Ad. & E. 895; *Langdell's Cases on Sales*, 673; *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970.

3 See *Austen v. Craven*, 4 Taunt. 644; *Langdell's Cases on Sales*, 741; *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942.

4 See case next cited, relying upon *Foot v. Marsh*, 51 N. Y. 288.

5 Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 282, 285.

6 Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 282, 285. As this was a mere ministerial act, which might be done by either party, or by any stranger, as well as by the parties themselves: *Hurff v. Hires*, 40 N. J. L. 581.

§ 112. **Separation from uniform mass.**—*Selection from variable bulk.* It is said to be undoubtedly the doctrine of the English courts<sup>1</sup> that where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection.<sup>2</sup> This doctrine has been said to be founded on correct principles, where the gross bulk is variable in kind or quality, and this selection from it of that part which shall be delivered is of benefit to the vendor.<sup>3</sup>

*Extension in England to uniform mass.* And it has been applied to a sale of a specified quantity from a larger bulk of a uniform kind and value, where the purchaser had seen the goods in bulk, and approved of it.<sup>4</sup>

*Distinctions made.* A distinction is made, however, by the English courts between actions directly between the vendor and purchaser, and those brought against parties who are treated as mere custodians of the property, and against whom trover is held maintainable on the ground of estoppel.<sup>5</sup> And it has been declared that while these courts adhere to the rule that as between vendor and purchaser, separation of the quantity sold from a larger bulk, identical in kind and quality, is unnecessary, yet slight and unimportant circumstances<sup>6</sup> will take the transaction out of the operation of the rule.<sup>7</sup>

*Conflict in American decisions.* In the American courts the cases on this subject are conflicting.<sup>8</sup> But in Virginia, New York, Connecticut, and Maine, the courts have held the broad doctrine, without qualification,<sup>9</sup> that on a contract of sale of a certain quantity from a larger bulk, uniform in kind and quality, the property will pass, though there be no separation of

the property sold, if such be the intention of the parties,<sup>10</sup> and that no rule of law will overrule such intention if it be otherwise clearly expressed.<sup>11</sup> This view has been declared to be an innovation upon the rule of the common law,<sup>12</sup> and the prior doctrine is said to be uniformly sustained by the text-writers and the English cases, though the weight of American authority is perhaps with the later view.<sup>13</sup> The older doctrine prevails, however, in Indiana, where it is held that on sale of part of a quantity of goods of the same kind, no title passes without separation or particular designation;<sup>14</sup> and the rule so adopted is said to be upheld by various American cases.<sup>15</sup>

1 *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282, 286.

2 *Gillett v. Hill*, 2 Crompt. & M. 530; *Langdell's Cases on Sales*, 755, 758. But compare statement in *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555; 29 Am. Rep. 418, 423.

3 *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282, 286.

4 *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859.

5 See *Whitehouse v. Frost*, 12 East, 614; *Langdell's Cases on Sales*, 734; *Woodley v. Coventry*, 2 Hurl. & C. 164; *Langdell's Cases on Sales*, 760; *Gillett v. Hill*, 2 Crompt. & M. 530; *Langdell's Cases on Sales*, 755; *Knights v. Wiffen*, Law R. 5 Q. B. 660; *Langdell's Cases on Sales*, 766; *Farmeloe v. Bain*, 1 C. P. Div. 445; 17 Eng. Rep. 349.

6 As in *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859.

7 *Hurff v. Hires*, 40 N. J. L. 581; 29 Am. Rep. 282, 289, 290.

8 See 2 Kent Com. (12th ed.) 492, 590; 6 Am. Law Rev. 450; *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 556; 29 Am. Rep. 418, 423.

9 See *Hurff v. Hires*, 40 N. J. L. 581; 50 Am. Rep. 282, 291.

10 See citations in next note

11 *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726; *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775; *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 498; *Chapman v. Shepard*, 39 Conn. 413; *Waldron v. Chase*, 37 Me. 414.

12 *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 555; 29 Am. Rep. 418, 423. And to be based on cases which proceed upon the theory that commercial interests demand a modification of the rule: *Com. Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222; citing, *Kimberly v. Patchin*, 19 N. Y. 330; *Langdell's Cases on Sales*, 775; *Pleasants v. Pendleton*, 6 Rand. 473; 18 Am. Dec. 726.

13 *Com. Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222.

14 *Com. Nat. Bank v. Gillette*, 90 Ind. 268; 46 Am. Rep. 222. Referring to following cases: *Murphy v. State*, 1 Ind. 366; *Bricker v. Hughes*, 4 Ind. 146; *Scott v. King*, 12 Ind. 203; *Lester v. East*, 49 Ind. 583, 594; *Indianapolis etc. Ry. Co. v. Maguire*, 62 Ind. 140; *Bertelson v. Bower*, 81 Ind. 512.

15 See following decisions cited in support of statement: *Hutchinson v. Hunter*, 7 Pa. St. 140; *Haldeman v. Duncan*, 51 Pa. St. 66; *Fuller v. Bean*, 34 N. H. 280; *Ockington v. Richey*, 41 N. H. 275; *Morrison v. Woodley*, 84 Ill. 192; *Woods v. McGee*, 7 Ohio, 467; *McLaughlin v. Platt*, 27 Cal. 463; *Courtright v. Leonard*, 11 Iowa, 32; *Ropes v. Lane*, 9 Allen, 502; *Ferguson v. Northern Bank*, 14 Bush, 555; 29 Am. Rep. 418. In Michigan it is declared the rule seems not to be definitely settled, but in a late case assent was given to the argument that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it: *Merchants' etc. Bank v. Hibbard*, 48 Mich. 118; 42 Am. Rep. 465; as noted, *Com. Nat. Bank v. Gillette*, 90 Ind. 263; 46 Am. Rep. 222.

‡ 113. *Illustrative cases.*—*Holding separation necessary.* The doctrine that separation from a larger mass of the same commodity, or of uniform character, is necessary to pass the title, has been applied to a sale of a number of barrels of pork, parcel of a larger quantity of similar brand in the vendor's cellar; <sup>1</sup> to an action of assumpsit to recover payment for one hundred barrels of molasses sold as parcel of one hundred and twenty-five barrels afterwards destroyed by fire, while on storage, and before separation or designation of any particular barrels; <sup>2</sup> to a contract for the sale of two thousand pieces of wall paper, where the purchaser gave his notes for the whole, but took away only one thousand pieces, and it was agreed that the rest of the pieces should remain until the purchaser called for them; <sup>3</sup> to a sale of two thousand eight hundred bushels of corn by a vendor who had three thousand one hundred bushels in his store, where the portion sold was never separated from the rest, and after the sale the whole was destroyed by fire; <sup>4</sup> and to a sale of nine arches of brick in a kiln containing a larger number, but not separated from the residue, or specifically designated, where a question of property arose between the vendee and an attaching creditor of the vendor, after such vendor had, by other sales, reduced the quantity on hand to less than nine arches. <sup>5</sup>

*Holding separation not necessary.* The doctrine that separation from a mass of uniform kind and quality is

not necessary to pass the title has been applied to a resale of a specified number of uncounted bags of meal, out of a mass of such bags, of uncertain numbers, on board a vessel, and only in part removed ;<sup>6</sup> to a sale of one hundred and nineteen barrels of flour out of a parcel of one hundred and twenty-three barrels, all of similar kind, in the same warehouse, and all having certain brands or marks, where the flour was destroyed by fire while on storage, and the vendee refused to pay upon the claim that the sale was not perfected for want of separation of the barrels disposed of ;<sup>7</sup> and to a replevin suit against an officer who had attached goods as belonging to a firm, including seventy-six bags of coffee delivered by the plaintiff to the firm, and held subject to his order, where such bags were in no way distinguished by marks, or separated from the other coffee of the firm.<sup>8</sup> So, where the owner of a large quantity of corn in bulk sells a certain number of bushels therefrom, and receives his pay, and the purchaser takes away a part, it has been held that the property in the part sold vests in the purchaser, although it is not measured or separated from the heap.<sup>9</sup>

*Destruction of flour before removal.* And where it was the usage of the business with reference to which the parties contracted that flour received by rails and stored was not removed by the consignee to his possession, but remained in the custody of the railroad company until sold, and that the owners sold in lots to various purchasers, and gave to each purchaser an order upon the company for the amount purchased, upon presentation whereof the agent would point out the lot from which the order was to be filled, and the purchaser would remove and receipt for the same, but nothing remained to be done by the seller, it has been held that by such usage flour called for by an order out of a

larger lot of the same brand and quality, some of which was entirely delivered as well as sold to other purchasers, was, after the acceptance of the order by the railroad company, the property of the purchaser;<sup>10</sup> and that he was liable for the price, though part of the flour was destroyed by fire before being removed to his actual possession.<sup>11</sup>

1 Scudder v. Worster, 11 Cush. 573; Langdell's Cases on Sales, 783, 786, 787, stating cases next noted.

2 Hutchinson v. Hunter, 7 Pa. St. 140; disapproving Pleasants v. Pendleton, 6 Rand. 475; 18 Am. Dec. 726.

3 Golder v. Ogden, 15 Pa. St. 528.

4 Waldo v. Belcher, 11 Ired. 609.

5 Merrill v. Hunnewell, 13 Pick. 213.

6 Chapman v. Shepard, 39 Conn. 413.

7 Pleasants v. Pendleton, 6 Rand. 473; 18 Am. Dec. 726; explained, Woods v. McGee, 7 Ohio, 127, 129. And see Hutchinson v. Hunter, 7 Pa. St. 140, 145; noted and quoted, Chapman v. Shepard, 39 Conn. 413, 422.

8 Gardner v. Dutch, 9 Mass. 427. See Scudder v. Worster, 11 Cush. 573; Langdell's Cases on Sales, 783, 784, 785, stating this and preceding case.

9 Waldron v. Chase, 37 Me. 414; as noted, Chapman v. Shepard, 39 Conn. 413, 423. Corn inspected and approved, and price agreed on and paid, but grain left in crib-house and levied upon: Hurff v. Hires, 40 N. J. L. 581; 29 Am. Rep. 582.

10 Newhall v. Langdon, 39 Ohio St. 87, 92; 48 Am. Rep. 426; distinguishing, Woods v. McGee, 7 Ohio, 467.

11 Newhall v. Langdon, 39 Ohio St. 87, 92; citing, Steel Works v. Dewey, 37 Ohio St. 242; Young v. Miles, 23 Wis. 643; Cloud v. Morrison, 18 Ind. 40; Horr v. Barker, 8 Cal. 483; Cushing v. Breed, 14 Allen, 376; Langdell's Cases on Sales, 783; Kimberly v. Patchin, 19 N. Y. 330; Langdell's Cases on Sales, 775; Waldron v. Chase, 37 Me. 414; Chapman v. Shepard, 39 Conn. 413; Whitehouse v. Frost, 12 East, 614; Langdell's Cases on Sales, 734; Hurff v. Hires, 17 Am. Law Reg. 17; 18 Am. Law Reg. 161, and notes: S. C. 40 N. J. L. 581; 29 Am. Rep. 282.



## CHAPTER X.

## SALES OF MANUFACTURED CHATTELS.

- § 114. In general.
- § 115. Need of completion, etc.
- § 116. Requisites to transfer of title.
- § 117. Need of delivery.
- § 118. Need of assent.
- § 119. Unfinished chattel.
- § 120. Ship-building contracts.
- § 121. Payment of instalments of price.
- § 122. Unattached materials.
- § 123. Title to chattels not finished.
- § 124. Title to unfinished vessels.

§ 114. In general.—*Presumption against immediate transfer of title.* Where an article is to be made to order, the same general presumption against an immediate transfer of property holds as in the case of existing chattels;<sup>1</sup> for on the mere agreement to supply, no specific thing can be identified as the property actually bargained for, but anything answering to the description might be afterwards furnished and appropriated to the contract.<sup>2</sup>

*Disposition of unsatisfactory chattel.* Thus a carriage-maker ordered to build a carriage after a certain pattern, might, if dissatisfied with his work, throw aside any number of carriages begun upon, or might turn them over to meet his more pressing orders from other quarters, before transferring his labors to that which finally turns out the specific property of a particular contract of sale.<sup>3</sup>

*Contract generally executory until chattel finished and appropriated.* Hence a contract of sale for a chattel not

at the time in existence, but to be made and finished by the seller, is executory only ;<sup>4</sup> and as a rule, no property in the chattel vests in the buyer until it is completely finished, and in some manner set aside and appropriated<sup>5</sup> to the contract.<sup>6</sup>

1 See *Halterline v. Rice*, 62 Barb. 593, 598.

2 2 Schouler on Personal Property, § 259. And see *Story on Sales*, §§ 233, 315; *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816, 825.

3 2 Schouler on Personal Property, § 259.

4 See *Story on Sales*, § 232.

5 See *Halterline v. Rice*, 62 Barb. 593, 600; *Williams v. Jackman*, 16 Gray, 514; *Langdell's Cases on Sales*, 906, 908.

6 2 Schouler on Personal Property, § 259; citing, *Story on Sales*, §§ 232, 315; *Blackburn on Sales*, 122, 128; *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792; *Atkinson v. Bell*, 8 Barn. & C. 271; *Langdell's Cases on Sales*, 801; *Anglo-Egyptian Nav. Co. v. Rennie*, Law R. 10 Com. P. 271; *Briggs v. Lightboat*, 7 Allen, 287; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Shaw v. Smith*, 48 Conn. 306; 40 Am. Rep. 170; *Halterline v. Rice*, 62 Barb. 593; *McIntyre v. Kline*, 30 Miss. 361; *First Nat. Bank v. Crowley*, 24 Mich. 492; *Gammage v. Alexander*, 14 Tex. 414; *Rider v. Kelly*, 32 Vt. 261.

§ 115. *Need of completion, etc.*—*Act remaining to be performed.* The rule that the title to property does not pass while anything remains to be done to ascertain either the quantity or price, applies as well to property thereafter to be manufactured as to that already *in esse*.<sup>1</sup>

*Chattel must be finished, etc.* Thus it is the general rule of law that under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is complete and delivered, or ready to be delivered.<sup>2</sup>

*Counter intent.* And this rule must prevail in all cases, unless a contrary intent is expressed, or clearly implied from the terms of the contract.<sup>3</sup>

1 *Halterline v. Rice*, 62 Barb. 593, 598.

2 *Williams v. Jackman*, 16 Gray, 514; *Langdell's Cases on Sales*, 906, 908. And see *Briggs v. Lightboat*, 7 Allen, 287, 292; *Elliott v. Edwards*, 35 N. J. L. 265, 268; *Wright v. O'Brien*, 5 Daly, 54, 56.

3 *Williams v. Jackman*, 16 Gray, 514; *Langdell's Cases on Sales*, 906, 908.

§ 116. **Requisites to transfer of title.** — *Completion, delivery, appropriation, etc.* In the case of a contract to manufacture goods, and to sell them, it is said to be a general rule that no property in the material passes to the purchaser until the article has been finished and delivered, or is ready for delivery,<sup>1</sup> and appropriated to the benefit of the purchaser, or set apart for him, with his assent, and accepted by him.<sup>2</sup>

*Procuring full payment for unfinished set of tools.* Thus where one contracted for a set of sewing-machine tools to be manufactured, and to pay the price as the work progressed, and the manufacturer, representing that the work was substantially completed, obtained payment of the balance of the purchase price, and then made an assignment for the benefit of creditors, it was held that title had not passed as against creditors, or even between the parties.<sup>3</sup>

*Rule concerning vessels, etc., in progress of completion.* For it has been declared to be the rule, according to decided cases and known principles of law, that in general under a contract for the building of a vessel, or making any other thing not existing at the time of the contract, no property vests in the party, whom for distinction one may call the purchaser, during the progress of the work, nor until the vessel or other thing is finished and delivered, or at least ready for delivery and approved by the purchaser.<sup>4</sup> And the builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specifications contained in the contract.<sup>5</sup>

1 See *Williams v. Jackman*, 16 Gray, 514; *Langdell's Cases on Sales*, 906, 908.

2 *Halterline v. Rice*, 62 Barb. 593, 600; citing, *Chitty on Contracts*, 378. And see *First Nat. Bank v. Crowley*, 24 Mich. 432; *Mucklow v.*

Mangles, 1 Taunt. 313, 319; Langdell's Cases on Sales, 792; Wilkins v. Bromhead, 6 Man. & G. 963; Langdell's Cases on Sales, 838; Moody v. Brown, 34 Me. 107, 109; Langdell's Cases on Sales, 909; Fairfield Bridge Co. v. Nye, 60 Md. 372; Rider v. Kelly, 32 Vt. 268; Cooke v. Millard, 65 N. Y. 352; 22 Am. Rep. 619, 628, 629; Andrews v. Durant, 11 N. Y. 35, 40; Langdell's Cases on Sales, 894. Compare McIntyre v. Kline, 30 Miss. 361, 364.

3 Shaw v. Smith, 48 Conn. 306; 40 Am. Rep. 170.

4 Clarke v. Spence, 4 Ad. & E. 448. And that this is the case even where the contract contains a specification of the dimension and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days: Clarke v. Spence, 4 Ad. & E. 448.

5 Clarke v. Spence, 4 Ad. & E. 448; Langdell's Cases on Sales, 816, 825.

§ 117. *Need of delivery.* — *In England.* Where a chattel is manufactured to order, it has been considered in England that no property vests till the chattel is finished and delivered.<sup>1</sup> Thus, trover has been held not to lie, because the goods might still have been sold to another person, where a barge, after the buyer's name was painted on the stern, was finished by the builder, who had been paid the whole price in portions, as the work proceeded, and who had previously committed an act of bankruptcy, but such barge was seized on execution by the creditors of the builder before he had delivered it up to the buyer;<sup>2</sup> and where goods ordered from a manufacturer were completed and loaded on barges to be forwarded to the purchaser, who had accepted a bill of exchange on account of the price, drawn by the manufacturer after he had committed an act of bankruptcy.<sup>3</sup>

*In this country.* So in this country it has been laid down that where a party orders a thing to be made, such as a vessel or any other articles, it does not become his property until it is delivered into his possession, even though he may have paid for it in advance, or furnished a large portion of the materials of which it is constructed.<sup>4</sup>

*Rule otherwise where different special stipulations.* But while this is the rule, it has been regarded as

equally well settled that it is competent for the parties to agree that the thing to be produced from the beginning, or at any stage of its production, is to be the property of the person who ordered it,<sup>5</sup> and that the title passes before delivery when a mutual assent to that effect is shown by unequivocal acts or declarations.<sup>6</sup>

*Everything done and notice given.* And it has been held that if the vendor has done everything he was to do under a contract for the manufacture and sale of a specific chattel, which was to be manufactured in accordance with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk.<sup>7</sup>

*Intention governs.* So, even in England it has been laid down that in case of chattels manufactured to order, as in the case of other chattels not specific, it depends upon the intention of the parties whether the property passes to the buyer;<sup>8</sup> and the property in unfinished bricks has been held to pass where the statement of the seller's foreman as to his readiness to deliver them made to the buyer's agent, amounted to an appropriation of the bricks.<sup>9</sup>

1 See *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792, 794. Compare *Wright v. O'Brien*, 5 Daly, 54, 56.

2 *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792, 793.

3 *Bishop v. Crawshay*, 3 Barn. & C. 415, 418, 419.

4 See *Wright v. O'Brien*, 5 Daly, 45, 46. But during its production it is, and after it is finished it continues to be, the property of the person who produced it, and may be levied upon and sold under an execution against him: *Wright v. O'Brien*, 5 Daly, 45, 46. And see citations in note before last.

5 See citations in next note.

6 See *Wright v. O'Brien*, 5 Daly, 54, 56. And consult *Andrews v. Durant*, 11 N. Y. 35, 42; *Langdell's Cases on Sales*, 894; *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794. Compare *Brown v. Bateman*, Law R. 2 Com. P. 272.

7 *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112, 118. And compare *Higgins v. Murray*, 4 Hun, 565, 567; *Pratt v. Maynard*, 116 Mass. 388, 391; *Shawhan v. Van Nest*, 25 Ohio St. 490, 494; *Thoub-*

boron v. Lewis, 43 Mich. 635, 637; Mount Hope Iron Co. v. Buffington, 103 Mass. 62, 64; Phelps v. Willard, 16 Pick. 29, 32; Bank of Upper Canada v. Killaly, 21 Up. Can. Q. B. 9.

8 Young v. Matthews, Law R. 2 Com. P. 127, 129; Langdell's Cases on Sales, 875.

9 Young v. Matthews, Law R. 2 Com. P. 127, 129; Langdell's Cases on Sales, 875.

§ 118. *Need of assent.*—*Statement and illustration.* It has been laid down as the result of British cases that in order to the passing of property, either manufactured to order or bought from a larger quantity of the same class of goods, there must, as a general rule, not only be an appropriation on the part of the seller,<sup>1</sup> but an assent to the appropriation on the part of the purchaser.<sup>2</sup> Thus, under a contract to manufacture glass chimneys, some of special shapes and others of ordinary shapes, where the goods were stored by the manufacturing company with a warehouseman as their goods, though contrary representations were made to the buyers, it was held that there was not a sufficient delivery to pass the property in the goods to the buyers, as there would have been if the manufacturers had delivered the goods to the warehouseman as the goods of the buyers, and the warehouseman had so accepted them.<sup>3</sup>

*Maintenance of action for goods bargained and sold.* And even where the spinning machines ordered by the purchaser had been made and altered and packed in boxes under the superintendence of the patentee acting in his behalf, and the vendor on whose premises they remained ready to be forwarded wrote to the purchaser inquiring by what conveyance they were to be sent, but became bankrupt before receiving an answer, it was held that an action for goods bargained and sold instead of for not accepting the goods was not maintainable by the assignees of the bankrupt against the purchaser, who had refused to take the goods,<sup>4</sup> for the property had not passed, as required for such action,<sup>5</sup> since there

was no such assent to the appropriation by the vendor as completed the same,<sup>6</sup> and although the vendor intended them for the purchaser, yet he might afterwards have delivered the goods to a third person.<sup>7</sup> Yet there has been held to be a sufficient assent to the appropriation of the article to sustain a count for goods bargained and sold where a party ordering a machine deposited a portion of the price, and when he saw it completed, made another payment on account, but though admitting in answer to a demand for the balance of the account that the machine was made according to his order, requested that it be sent home before it was paid for, and subsequently claimed that the price was exorbitant, but said he would endeavor to arrange it if given time.<sup>8</sup>

*Sufficiency of appropriation.* The appropriation of a greenhouse has likewise been regarded as complete, so as to transfer the property to the buyer, where the latter on being notified that the article was ready for delivery remitted the price as requested, and asked the maker to keep the greenhouse until the buyer should send for it.<sup>9</sup>

*Tender, etc., of manufactured article.* But it is held that the mere tender of an article manufactured pursuant to the order of a customer does not transfer the title to the latter, nor does the leaving the article with the customer against his will have this effect,<sup>10</sup> since to pass the title<sup>11</sup> there must generally be an acceptance express or implied.<sup>12</sup>

*Payment by instalments, and superintendence of work.* An exception to the general rule is said to exist, however, when the customer employs a superintendent, and pays for the property by instalments as the work progresses.<sup>13</sup>

1 See *Stock v. Inglis*, Law R. 9 Q. B. D. 708, 717.

2 *Gowans v. Consolidated Bank of Canada*, 43 Up. Can. Q. B. 318, 325.

3 *Gowans v. Consolidated Bank of Canada*, 43 Up. Can. Q. B. 318, 319, 326; citing and reviewing many English and some Canadian cases.

4 *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801, 803, 805. But compare *Rohde v. Thwaites*, 6 Barn. & C. 383; *Langdell's Cases on Sales*, 138; *Fragano v. Long*, 4 Barn. & C. 219; *Langdell's Cases on Sales*, 798. See note to *Shawhan v. Van Nest*, 25 Ohio St. 490; 15 Am. Law Reg. N. S. 153, 160.

5 See *Bailey v. Smith*, 43 N. H. 141, 143; *Gordon v. Norris*, 49 N. H. 376, 382. Compare *Spicers v. Harvey*, 9 R. I. 582, 584.

6 Assent to appropriation: See section of next chapter on that subject.

7 *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801, 803, 805. And see *Gooderham v. Dash*, 9 Up. Can. C. P. 413, 416, 417; *Robertson v. Strickland*, 28 Up. Can. Q. B. 221, 229. Compare *O'Neil v. McIlmoyle*, 34 Up. Can. Q. B. 236, 245.

8 *Elliott v. Pybus*, 10 Bing. 512; *Langdell's Cases on Sales*, 806. See *Shawhan v. Van Nest*, 25 Ohio St. 490; 15 Am. Law Reg. N. S. 153, 162.

9 *Wilkins v. Bromhead*, 6 Man. & G. 963; *Langdell's Cases on Sales*, 831.

10 *Moody v. Brown*, 34 Me. 107, 109; *Langdell's Cases on Sales*, 909.

11 Transfer of title: See subsequent chapter on that subject.

12 *Moody v. Brown*, 34 Me. 107, 109; *Langdell's Cases on Sales*, 909. And see *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801. Compare *Fairfield Bridge Co. v. Nye*, 60 Md. 372; *Tripp v. Armitage*, 4 Mees. & W. 687; *Langdell's Cases on Sales*, 829. But see *Brewer v. Smith*, 15 Wend. 493; *Langdell's Cases on Sales*, 889.

13 *Moody v. Brown*, 34 Me. 107, 110; *Langdell's Cases on Sales*, 809. And see *Sandford v. The Wiggins Ferry Co.* 27 Ind. 522; *Woods v. Russell*, 9 Barn. & Ald. 542; *Langdell's Cases on Sales*, 794; *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816. Compare *In re Lindsay*, Law R. 10 Ch. App. 405; 12 Eng. Rep. 782. But see *Green v. Hall*, 1 Houst. 506, 513; *Elliott v. Edwards*, 35 N. J. L. 265, 268; *Williams v. Jackman*, 16 Gray, 514, 517, 518; *Langdell's Cases on Sales*, 906; *Andrews v. Durant*, 11 N. Y. 35, 40; *Langdell's Cases on Sales*, 844.

§ 119. *Unfinished chattel.*—*Showing express intention to pass title.* In the class of cases where the subject of the contract is an unfinished or incomplete thing, being a chattel not in a deliverable state, as a partly built carriage or ship, it has been held by the courts, irrespective of the cases where no specific chattel has been appropriated,<sup>1</sup> that it is necessary to show an express intention in the parties<sup>2</sup> that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule<sup>3</sup> that governs where goods are not in a deliverable state.<sup>4</sup>



*Transfer of thing in its existing state.* And on a sale of an unfinished chattel as such, or of a chattel progressing toward completion,<sup>5</sup> the true question has been declared to be whether the parties, by mutual acts and conduct, had already concluded a transfer of the property to the thing in its existing state, or at least of the risks which usually attend ownership.<sup>6</sup> Thus, a party may agree to purchase a ship as she then stands, thus making a present bargain and sale of the existing materials, instead of making a contract to purchase the ship when finished, in which case no property previously passes.<sup>7</sup>

*Delivery, bill of sale, etc.* And while ordinarily a contract for the sale of a chattel not yet finished must be regarded as executory,<sup>8</sup> yet if the parties have manifested their intent that the transfer of property shall take place in the finished product at once, that intention will take effect.<sup>9</sup> Not only may delivery be in such case a significant fact in proof of a completed sale and transfer of title, but the same effect would be given to an absolute bill of sale,<sup>10</sup> which would be more appropriate when the seller had yet to finish the thing;<sup>11</sup> for one may make an outright purchase of an unfinished chattel, on the understanding that the seller should finish it for the buyer, and retain possession longer for that purpose.<sup>12</sup>

1 See *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792; *Bishop v. Crawshay*, 3 Barn. & C. 415; *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801.

2 See *Young v. Matthews*, Law R. 2 Com. P. 127, 129; *Langdell's Cases on Sales*, 875.

3 See § 86, on PUTTING INTO DELIVERABLE STATE.

4 *Bennett's Benjamin on Sales*, § 335; citing, *Thorndike v. Bath*, 114 Mass. 116.

5 See *Laidler v. Burlinson*, 2 Mees. & W. 602; *Langdell's Cases on Sales*, 664, 671.

6 2 *Schouler on Personal Property*, § 253; citing, *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794; *Young v. Matthews*, Law R. 2 Com. P. 127; *Langdell's Cases on Sales*, 875; *McConihie v. New York etc. R. R. Co.* 20 N. Y. 495; *Brown v. Bate-man*, Law R. 2 Com. P. 272; *Thorndike v. Bath*, 114 Mass. 116.

7 See *Laidler v. Burlinson*, 2 Mees. & W. 664; *Langdell's Cases on Sales*, 664, 672.

8 See *Story on Sales*, §§ 232, 233.

9 2 *Schouler on Personal Property*, § 268; stating, *Young v. Matthews*, Law R. 2 Com. P. 127; *Langdell's Cases on Sales*, 875; and noting for comparison, *Crofoot v. Bennett*, 2 Comst. 253; *Langdell's Cases on Sales*, 772.

10 Bill of sale in general: See 1 *Bouvier Law Dict.* (14th ed.) 207.

11 2 *Schouler on Personal Property*, § 268, whence paragraph derived.

12 See *Thorndike v. Bath*, 114 Mass. 116. Yet while this transfer holds good as between the parties, it might be regarded as a fraud upon creditors, by leaving the seller in visible possession. Compare *Shaw v. Smith*, 48 Conn. 306; 40 Am. Rep. 170.

§ 120. *Ship-building contracts.*—*Title to uncompleted vessel.* In ship-building contracts, where the price is payable in instalments at specified stages in the progress of the work, it is held in England that the payment of the first instalment vests in the buyer the title in so much of the vessel as is then constructed;<sup>1</sup> and that as soon as new materials are subsequently added, they immediately become the property of the buyer.<sup>2</sup> But this view has not been adopted in this country;<sup>3</sup> and on the contrary it has been generally and almost uniformly held that no title vests in the buyer until the vessel is completed.<sup>4</sup>

*Superintendent for intended buyer.* It is said to be agreed that the additional circumstance that the vessel was to be built under the direction and subject to the approval of a superintendent appointed by the intended buyer, has the effect of appropriating the vessel to the contract as fast as it is constructed;<sup>5</sup> but it is the American doctrine that this circumstance, even combined with the payment of the price in instalments, at successive stages of the work, does not operate to transfer the title.<sup>6</sup>

*Express agreement and burden of proof.* And it has even been held, that where by the express undertaking of the parties it is agreed that when an instalment is

paid, the vessel, so far as then constructed, and the materials therein inserted, are to be and become the property of the persons making such payments, yet the burden is on the intended purchaser to show that the title of the builders was divested before the furnishing of materials upon which a lien was claimed to have attached against the builders.<sup>7</sup>

*Question of intent and interpretation.* The view taken by the Supreme Court of the United States does not favor any such arbitrary rule of construction as that adopted in England,<sup>8</sup> but seeks to carry into effect the intent of the parties as gathered from the terms of the contract and all the attendant circumstances.<sup>9</sup> And neither in England nor in America is the question treated as other than one concerning the interpretation of a contract to ascertain the true intent of the parties;<sup>10</sup> and the point of difference between the cases is not regarded as vital, but as going only to construction and the burden of proof.<sup>11</sup>

*Stipulations as instalments, superintendence, etc., not decisive.* Thus in Massachusetts it has been declared to be erroneous to say, as is sometimes stated by text-writers, that an agreement to pay the purchase-money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended.<sup>12</sup> And it is said that such stipulations may be very significant, as indicating the intention of the parties, but they are not in all cases decisive, as both of them may coexist in a particular case, and yet the property may remain in the builder or manufacturer.<sup>13</sup>

1 See citations in next note.

2 *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794. And see *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816, and index note 1030. Consult, also, *Andrews v. Durant*, 11

N. Y. 305; Langdell's Cases on Sales, 895, 899. Earlier English cases otherwise: Mucklow v. Mangles, 1 Taunt. 318; Langdell's Cases on Sales, 792. And compare Towers v. Osborne, 1 Strange, 596; Groves v. Buck, 5 Maule & S. 178; Langdell's Cases on Sales, 9. Consult Elliott v. Edwards, 35 N. J. L. 265, 267.

3 See citations in next note.

4 See Merritt v. Johnson, 7 Johns. 473; 5 Am. Dec. 239; Langdell's Cases on Sales, 833; Andrews v. Durant, 11 N. Y. 35; Langdell's Cases on Sales, 894; Williams v. Jackman, 16 Gray, 514; Langdell's Cases on Sales, 906, and index note 1030; Green v. Hall, 1 Honst. 506, 514. And consult Johnson v. Hunt, 11 Wend. 135, 139; Langdell's Cases on Sales, 835; Briggs v. Lightboat, 7 Allen, 287; Tompkins v. Dudley, 25 N. Y. 272, 273; Elliott v. Edwards, 35 N. J. L. 265, 267, 268; Derbyshire's Estate, 81 Pa. St. 18. Compare, also, Gregory v. Stryker, 2 Denio, 623; Mixer v. Howarth, 21 Pick. 205; Langdell's Cases on Sales, 25; Spencer v. Cone, 1 Met. 283; Langdell's Cases on Sales, 28; Shaw v. Smith, 48 Conn. 306; 40 Am. Rep. 170; McConihie v. N. Y. etc. R. R. Co. 20 N. Y. 425; West Jersey R. R. Co. v. Trenton Car Works Co. 33 N. J. L. 517. But see *contra*, Sandford v. Wiggins, 27 Ind. 522.

5 See Clarke v. Spence, 4 Ad. & E. 448; Langdell's Cases on Sales, 816, and index note 1030. So that as soon as the construction of the vessel is begun, there is a contract for that specific vessel: Clarke v. Spence, 4 Ad. & E. 448.

6 Andrews v. Durant, 11 N. Y. 35; Langdell's Cases on Sales, 894, 899.

7 Elliott v. Edwards, 35 N. J. L. 265, 268.

8 See preceding portion of section.

9 Clarkson v. Stevens, 106 U. S. 505, 515.

10 See citations in next note.

11 2 Schouler on Personal Property, § 267; citing, Briggs v. Lightboat, 7 Allen, 287; Elliott v. Edwards, 35 N. J. L. 265; Clarkson v. Stevens, 106 U. S. 506.

12 Briggs v. Lightboat, 7 Allen, 287, 293.

13 Briggs v. Lightboat, 7 Allen, 287, 293. The question is considered to be one of intent, arising on the interpretation of the entire contract in each case: Briggs v. Lightboat, 7 Allen, 287, 293. And it is asserted that even in England where the cases go the farthest in holding that property in a chattel in the course of construction passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him: Briggs v. Lightboat, 7 Allen, 287, 293.

§ 121. Payment of instalments of price.—*English rule of construction.* The English rule of construction is that where in a ship-building contract the price was to be paid in portions, according to the progress of the work, on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser.<sup>1</sup>

*American views.* This rule has been followed in Indiana,<sup>2</sup> but a similar doctrine to that of Massachusetts,

which leaves the question to be settled by the intention of the parties,<sup>3</sup> appears to be adopted<sup>4</sup> in New York,<sup>5</sup> Pennsylvania,<sup>6</sup> and New Jersey,<sup>7</sup> as well as by the Supreme Court of the United States.<sup>8</sup>

1 Clarke v. Spence, 4 Ad. & E. 448; Langdell's Cases on Sales, 816, 828; following, Woods v. Russell, 5 Barn. & Ald. 942; Langdell's Cases on Sales, 794. And see Laidler v. Burlinson, 2 Mees. & W. 602; Langdell's Cases on Sales, 664, 671; Wood v. Bell, 5 El. & B. 772; 6 El. & B. 355; Langdell's Cases on Sales 847, 854; Campbell on Sales, 273. Consult Andrews v. Durant, 1 Kern. 35; Langdell's Cases on Sales, 594, 900, 904; citing, Story on Sales, §§ 315, 316; Long on Sales, 283; Chitty on Contracts, 378, 379; Abb. Shipp. 4, 5.

2 Sandford v. Wiggins' Ferry Co. 27 Ind. 522, 527.

3 See Briggs v. Lightboat, 7 Allen, 287, 292; Williams v. Jackman, 16 Gray, 514; Langdell's Cases on Sales, 906, 909; Wright v. Tetlow, 99 Mass. 397, 404.

4 According to Bennett's Benjamin on Sales, § 351, n. m.

5 See Andrews v. Durant, 1 Kern. 35; Langdell's Cases on Sales, 894, 900; Merritt v. Johnson, 7 Johns. 473; Langdell's Cases on Sales, 883, 884.

6 Derbyshire's Estate, 81 Pa. St. 18, 22; citing, Scull v. Shakspear, 75 Pa. St. 297, 303. And see Coursin's Appeal, 79 Pa. St. 220; Long's Appeal, 81 Pa. St. 18. New contract by taking chattel in unfinished state: See Clemens v. Davis, 7 Pa. St. 263, 264.

7 Elliott v. Edwards, 35 N. J. L. 265, 268; relying upon West Jersey R. R. Co. v. Trenton Car Works, 32 N. J. L. 517, 524.

8 Clarkson v. Stevens, 106 U. S. 505, 515. But see Calais Steamboat Co. 1 Cliff. 370, 378, 379; reversed on other grounds, 2 Black, 372; U. S. Revenue Cutter, 4 Am. L. T. Rep. N. S. 39.

§ 122. **Unattached materials.**—*Presumption against transfer of title.* The property in materials designed for an unfinished chattel, and not affixed thereto, such as a rudder and cordage, bought for some particular ship by the seller of the ship,<sup>1</sup> will still be presumed, notwithstanding a constructive change of ownership in the unfinished chattel, to remain in such seller, if the materials have not been so incorporated<sup>2</sup> with the principal thing as to become part of it,<sup>3</sup> though this rule may be affected by the mutual agreement of the parties clearly expressed.<sup>4</sup>

*Effect of acceptance.* And while the approval of the buyer's own agent, if it goes directly to the point of accepting the product, will conclude the buyer himself

as to acceptance of work made to order,<sup>5</sup> yet acceptance merely with the intent of pronouncing materials suitable for the structure constitutes no acceptance of the structure into which those materials are worked.<sup>6</sup>

*Applications of principles.* These principles have been applied to contracts concerning parts of steam-engines, unriveted iron plates, other iron materials, and unfastened planking for a screw steamer;<sup>7</sup> concerning sash-frames for hotel windows, approved by the surveyor, but removed from the premises to affix pulleys to them;<sup>8</sup> concerning plank worked into columns for piazzas and other carved work contained in a barn on the lot on which the house for which the products were designed was to be erected;<sup>9</sup> and concerning boilers and other new machinery completed and ready to be fixed on board a vessel which was lost at sea after one instalment of the price of the work had been paid.<sup>10</sup>

1 Compare *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794, 797.

2 2 Schouler on Personal Property, § 268.

3 See *Wood v. Bell*, 5 El. & B. 662; 6 El. & B. 355; *Langdell's Cases on Sales*, 847, 858; *Tripp v. Armitage*, 4 Mees. & W. 687; *Langdell's Cases on Sales*, 824, 829, 835; *Johnson v. Hunt*, 11 Wend. 135; *contra*, *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794, 797; *Goss v. Quinton*, 3 Man. & G. 825; *Langdell's Cases on Sales*, 885, 887.

4 See *Brown v. Bateman*, Law R. 2 Com. P. 272.

5 2 Schouler on Personal Property, § 268, whence paragraph derived; citing, *Young v. Matthews*, Law R. 2 Com. P. 127; *Langdell's Cases on Sales*, 275; *Clarke v. Spence*, 4 Ad. & E. 467; *Langdell's Cases on Sales*, 816, 826.

6 *Tripp v. Armitage*, 4 Mees. & W. 687; *Langdell's Cases on Sales*, 829, 834. Such approval does not mean the assent of the parties to take the article and pay for it at once, but merely the approval of it as a proper thing to be put up: *Tripp v. Armitage*, 4 Mees. & W. 687.

7 *Wood v. Bell*, 5 El. & B. 772; 6 El. & B. 355; *Langdell's Cases on Sales*, 847, 852.

8 *Tripp v. Armitage*, 4 Mees. & W. 687; *Langdell's Cases on Sales*, 829, 834.

9 *Johnson v. Hunt*, 11 Wend. 135; *Langdell's Cases on Sales*, 885, 887. See *Abbott v. Blossom*, 66 Barb. 353, 354.

10 *Anglo-Egyptian Navigation Co. v. Rennie*, Law R. 10 Com. P. 271. See statements of cases in *Bennett's Benjamin on Sales*, §§ 339 a, 342; 1 *Corbin's Benjamin on Sales*, §§ 387, 390. And compare *Campbell on Sales*, 273, 274.

§ 123. **Title to chattels not finished.**— *Unfinished cutter nearly paid for.* Where the buyer made a payment of nearly the entire price for an unfinished cutter, which the seller was to finish within ten days, but such seller became bankrupt without having finished the cutter, it was held that no title had passed to the buyer who brought trover for the value of the cutter against the seller's assignee.<sup>1</sup>

*Wagon not finished in time.* And where a wagon was ordered to be built, price payable in mutton, and the mutton was furnished and the wagon was completed, but not in the time stipulated, it was declared that no property in such case vests until the thing is finished and delivered.<sup>2</sup>

*Construction of cars.* So where a contract was made for the construction of five cars, and the buyer furnished plush for the seats for a price amounting to more than the price of one car, and to be deducted from the bill for the five cars, but one of the cars came into the possession of the buyer without the manufacturer's consent, and trover was brought for its value against the company which held under the buyer, it was held that upon any construction of the contract the car remained the property of the manufacturer, and the plush passed to him as the owner of the car.<sup>3</sup>

1 *Halterline v. Rice*, 62 Barb. 593; following, *Andrews v. Durant*, 1 Kern. 35; *Langdell's Cases on Sales*, 894.

2 *Bennett v. Platt*, 9 Pick. 558; quoting, *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792. Though the case was decided on the ground that by suing for the value of the mutton the buyer had elected to rescind the contract, and could not afterwards claim property in the chattel: *Bennett v. Platt*, 9 Pick. 558.

3 *West Jersey Railroad Co. v. Trenton Car Works*, 32 N. J. L. 517. But where cars were manufactured under the supervision of an agent of the buyer, payment to be made monthly, as the work progressed, it was held that title vested without delivery: *Bank of Upper Canada v. Killaly*, 21 Up. Can. Q. B. 9; following, *Wood v. Bell*, 5 El. & B. 772; 6 El. & B. 355; *Langdell's Cases on Sales*, 847. Source of foregoing statements of cases: 1 *Corbin's Benjamin on Sales*, §§ 408, 409, 411, 413. Compare *Phelps v. Willard*, 16 Pick. 29, 32.

§ 124. Title to unfinished vessels.—*Trover for ship attached when two thirds finished.* Where a ship-builder contracted to build a ship, receiving payment in three equal instalments, as the work progressed, and after the ship was two thirds finished and two thirds paid for it was attached and sold by creditors of the builder, but the buyer having received possession refused to give it up, and trover was brought against him, it was held that the question in such cases was one of intent, and that it was not reasonable to suppose that the property was to pass before completion, especially as the ship was to be delivered at Philadelphia, and pass inspection there.<sup>1</sup>

*Title in buider as against lien claimants.* And where the contract was for the construction of a vessel, price payable by instalments as the work progressed, and it was expressly agreed that as the instalments should be paid, the vessel so far as constructed should become the property of the buyer, it was held where persons furnishing materials filed liens against the vessel and against the builder as owner, that the title was in the builder,<sup>2</sup> and that it devolved on the buyers to show that payments divesting that title, under the terms of the agreement, were made before the materials of the claimants were furnished, and their lien thereby attached.<sup>3</sup>

*No title in government before completion and delivery.* So it has been held that under a contract to build three light vessels for the United States, and to deliver them when completed within a fixed time, no title passed to the United States until their completion and delivery, where the builder was to be governed during the progress of the building of them by an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion, and there was a provision that the United States might at any time declare the contract null.<sup>4</sup>



*Provisions as to instalments and superintendence.*

The American doctrine against transfer of title has also been laid down in cases where the work of building a barge was to be performed under the direction of a superintendent employed by the buyers, and was to be paid for at specific stages of the work;<sup>5</sup> and a like conclusion has been reached where the contract was to build, finish, and complete, ready for sea, a first-class, copper-fastened ship, but as the agreement was construed, there was no stipulation to pay instalments at certain specified successive stages of the work, though there was an arrangement for advance payments, and there was no right reserved to exercise any superintendence or control over the work, though oversight thereof by an agent of the buyers was permitted.<sup>6</sup>

1 *Green v. Hall*, 1 Houst. 506, 546; citing and following, *Merritt v. Johnson*, 7 Johns. 473; *Langdell's Cases on Sales*, 883; and *Andrews v. Durant*, 1 Kern. 35; *Langdell's Cases on Sales*, 894. Stating that the English doctrine of appropriation announced in *Woods v. Russell*, 5 Barn. & Ald. 942, *Langdell's Cases on Sales*, 794, and *Clarke v. Spence*, 4 Ad. & E. 443, *Langdell's Cases on Sales*, 816, had never been followed in America.

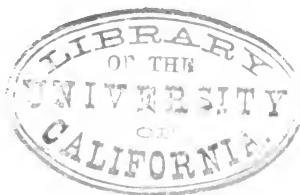
2 *Elliott v. Edwards*, 35 N. J. L. 265. As on an executory contract to build a vessel, to be paid for in instalments as the work progresses, the title remains in the builder until the work is completed and delivered: *Elliott v. Edwards*, 35 N. J. L. 265; affirmed on writ of error, as *Edwards v. Elliott*, 36 N. J. L. 449; following, *Andrews v. Durant*, 1 Kern. 35; *Langdell's Cases on Sales*, 894; and *Laidler v. Burlinson*, 2 Mees. & W. 602; *Langdell's Cases on Sales*, 664. But refusing to follow: *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794; and *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816.

3 *Elliott v. Edwards*, 35 N. J. L. 265. So that in the absence of proof on this point, the liens were sustained: *Elliott v. Edwards*, 35 N. J. L. 265; approving, *Groves v. Buck*, 3 Maule & S. 178; *Langdell's Cases on Sales*, 9; and *Mucklow v. Mangles*, 1 Taunt. 318; *Langdell's Cases on Sales*, 792; also, *Andrews v. Durant*, 1 Kern. 35; *Langdell's Cases on Sales*, 894; and *Mixer v. Howarth* 21 Pick. 205; *Langdell's Cases on Sales*, 25. And regarding as not easily reconcilable with established principles: *Woods v. Russell*, 5 Barn. & Ald. 942; *Langdell's Cases on Sales*, 794. Source of foregoing statements of cases: 1 *Corbin's Benjamin on Sales*, §§ 410, 412.

4 *Briggs v. Lightboat*, 7 Allen, 287; as stated, *Bennett's Benjamin on Sales*, § 251, n. m. And see 1 *Corbin's Benjamin on Sales*, § 399; followed, *Wright v. Tetlow*, 93 Mass. 397.

5 *Andrews v. Durant*, 1 Kern. 35; *Langdell's Cases on Sales*, 894, 898, 902; stating, discussing, and declining to follow, English cases of *Woods v. Russell*, 5 Barn. & Ald. 942, *Langdell's Cases on Sales*, 794, and *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816; also stating and relying upon, *Merritt v. Johnson*, 7 Johns. 473; *Langdell's Cases on Sales*, 883; and referring to *Johnson v. Hunt*, 11 Wend. 135; *Langdell's Cases on Sales*, 885; *Blackburn on Sales*, 153.

6 *Williams v. Jackman*, 16 Gray, 514; *Langdell's Cases on Sales*, 906, 908, 909; approving, *Andrews v. Durant*, 1 Kern. 55; *Langdell's Cases on Sales*, 894.



## CHAPTER XI.

## APPROPRIATION.

- § 125. Appropriation in general.
- § 126. Scope of term.
- § 127. Acts of appropriation.
- § 128. Appropriation by seller.
- § 129. Determining election.
- § 130. Assent to appropriation.
- § 131. Acts of assent.
- § 132. Restricted appropriation, etc.
- § 133. Conformity to contract.
- § 134. Excess in quantity of goods.
- § 135. Substitution of other goods.
- § 136. Delivery as showing appropriation, etc.
- § 137. Delivery to carrier.
- § 138. Delivery "free on board."
- § 139. Dispatching goods.
- § 140. Handling over documents.
- § 141. Accepting or discounting bill of exchange.

§ 125. **Appropriation in general.**—*Required for unspecified chattels.* Under a contract for sale of chattels not specific, the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract;<sup>1</sup> that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it.<sup>2</sup>

*Effect on prior executory contract.* And after an executory contract of sale has been entered into, it may be converted into a complete bargain and sale by the subsequent appropriation of specific chattels to the contract.<sup>3</sup>

*Need of specifications, etc.* For it is said to be an elementary principle of law, applicable alike to sales, mort-

gages, and pledges, that the contract becomes executed only by specifying the goods to which is to attach; or in legal phrase, by the appropriation of the specific goods to the contract.<sup>4</sup> So it is declared that no rules of the law of vendor and purchaser are more clear than this, that the property is not transferred until the appropriation and separation of a particular quantity, or signification of assent<sup>5</sup> to the particular quantity.<sup>6</sup> But under what may be termed the modern American doctrine, where the mass from which the sale, mortgage, or pledge is made, is a uniform mass, as wheat in an elevator, separation from the mass is not necessary to constitute an appropriation of the property to the contract.<sup>7</sup>

1 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201.

2 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201. And see *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942, 946.

3 See *Merchant's Nat. Bank v. Bangs*, 109 Mass. 291, 295.

4 *Fishback v. Van Deusen*, 33 Minn. 111, 122. Until this is done the contract is executory, and the property does not pass: *Fishback v. Van Deusen*, 33 Minn. 111, 122.

5 See § 130, on ASSENT TO APPROPRIATION.

6 *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 857, 864.

7 *Fishback v. Van Deusen*, 33 Minn. 111, 122; 19 *The Reporter*, 501.

§ 126. *Scope of term. — Conversion of executory contract into bargain and sale.* The rule in regard to transfers of chattels not specific is as stated,<sup>1</sup> that after an executory contract has been made it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach,<sup>2</sup> or, in legal phrase, by the appropriation of specific goods to the contract, thereby supplying the sole element deficient to make a perfect sale.<sup>3</sup> And although the contract has been made in two successive stages, instead of being completed at one time, yet it is none the less one contract, namely, a bargain and sale of goods.<sup>4</sup>

*Different senses of word "appropriation."* But the word "appropriation" may be understood in different senses.<sup>5</sup> Thus, it may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract,<sup>6</sup> or it may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case.<sup>7</sup> "Appropriation" may also be used in another sense, so as to apply to the case where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it.<sup>8</sup>

*Judicial extension of term.* And there has been a judicial extension of the term, through delivery and over the last stage of transit of the goods, and even up to a final acceptance on the buyer's part.<sup>9</sup>

1 See § 125, on APPROPRIATION IN GENERAL.

2 See citations in next note. And consult Campbell on Sales, 234, 235.

3 Bennett's Benjamin on Sales, § 358. And see Fishback v Van Deusen, 33 Minn. 111, 122; 2 Schouler on Personal Property, § 260.

4 See section on SALE OR EXECUTORY AGREEMENT; Bennett's Benjamin on Sales, § 358.

5 Wait v. Baker, 2 Ex. 1; Langdell's Cases on Sales, 942, 946.

6 See Rohde v. Thwaltes, 6 Barn. 388, 393; Langdell's Cases on Sales, 138, 140. See § 127, on ACTS OF APPROPRIATION.

7 Wait v. Baker, 2 Ex. 1; Langdell's Cases on Sales, 942, 946.

8 Wait v. Baker, 2 Ex. 1; Langdell's Cases on Sales, 942, 946. Compare section on PUTTING INTO DELIVERABLE STATE.

9 2 Schouler on Personal Property, §§ 260, 265.

§ 127. *Acts of appropriation. — Parties concerned in.* Sometimes the right of ascertainment of the goods sold rests with the vendee, and sometimes solely with the vendor; and besides the case where, by virtue of the original agreement, the authority to appropriate is in one party only, there are cases where one party appropriates and the other assents.<sup>1</sup>

*Selection of goods and adoption of act.* Thus, the selection of the goods by one party, and the adoption of that act by the other, may convert that which before was a mere agreement to sell into an actual sale, whereby the property passes.<sup>2</sup> For where a party sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods sold and delivered until he has made that selection;<sup>3</sup> but as soon as he appropriates part for the benefit of the vendee, and the latter assents thereto,<sup>4</sup> the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price.<sup>5</sup> And there has been held to be an appropriation passing the title where the vendor, having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads, filled up and delivered four hogsheads, then later filled up the remaining sixteen hogsheads, and gave notice to the vendee that they were ready, and required him to take them away, which he said he would as soon as he could.<sup>6</sup>

*Putting goods into buyer's receptacles, etc.* So it has been held an act of appropriation which vests the property in the buyer for the seller to put the goods into the buyer's receptacles,<sup>7</sup> and that the liability of the seller ceased, and the goods were at the risk of the purchaser when they were put on board a ship bound for the place of delivery, and the requisite documents handed over to the buyer.<sup>8</sup>

*Conditional appropriation and further acts.* But the appropriation may be conditional or provisional, as on payment,<sup>9</sup> or where the vendor retains his hold upon the goods to secure payment of the price,<sup>10</sup> although he delivers the goods to a carrier and thus puts them in course of transportation to the place of destination.<sup>11</sup>

And there may also be further acts requisite on the part of the seller to put the property into a deliverable state.<sup>12</sup>

1 Aldridge v. Johnson, 7 El. & B. 885; Langdell's Cases on Sales, 853, 864. Compare Browne v. Hare, 3 Hurl. & N. 484; 4 Hurl. & N. 822; Langdell's Cases on Sales, 976, 989.

2 See Rohde v. Thwaites, 6 Barn. & C. 388, 393; Langdell's Cases on Sales, 138, 140; Bennett's Benjamin on Sales, § 358, n.; stating, Claflin v. Boston etc. R. R. 7 Allen, 341; citing, Hyde v. Lathrop, 2 Abb. N. Y. App. 436; and referring also to following cases: *U. S.* — Chapman v. Searle, 3 Pick. 38; Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295; Thompson v. Conover, 3 Vroom, 466; Gough v. Edelin, 5 Gill, 101. *Can.* — Coleman v. McDermot, 5 Up. Can. C. P. 303; Bickford v. Grand Junction Ry. Co. 1 Duval, 606, 723. *New Bruns.* — Macpherson v. Fredericton Boom Co. 1 Hann. 337.

3 See citations in note after next.

4 Assent to appropriation: § 130.

5 Rohde v. Thwaites, 6 Barn. & C. 388, 392; Langdell's Cases on Sales, 138. And see Fragano v. Long, 4 Barn. & C. 219; Langdell's Cases on Sales, 798; Alexander v. Gardner, 1 Bing. N. C. 671; Langdell's Cases on Sales, 810; Wilkins v. Bromhead, 6 Man. & G. 963; Langdell's Cases on Sales, 838. Compare Jenner v. Smith, Law R. 4 Com. P. 270; Langdell's Cases on Sales, 877.

6 Rohde v. Thwaites, 6 Barn. & C. 388; Langdell's Cases on Sales, 138.

7 Langton v. Higgins, 4 Hurl. & M. 492; Langdell's Cases on Sales, 837. And see Aldridge v. Johnson, 7 El. & B. 885; Langdell's Cases on Sales, 853; Ogg v. Shuter, Law R. 10 Com. P. 159, 162; reversed, Law R. 1 C. P. D. 47.

8 Tregelles v. Sewell, 7 Hurl. & N. 574. And see Sparkes v. Marshall, 2 Bing. N. C. 761. Compare Bryans v. Nix, 4 Mees. & W. 775.

9 Godts v. Rose, 17 Com. B. 229; 25 Law J. Com. P. 61; Langdell's Cases on Sales, 970.

10 See chapter on RESERVATION OF CONTROL.

11 Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295. And see § 137, on DELIVERY TO CARRIER.

12 2 Schouler on Personal Property, §§ 260, 263. And see section on PUTTING INTO DELIVERABLE STATE.

§ 128. *Appropriation by seller.* — *Difficulty in determining finality of act.* The real difficulty in determining when the appropriation is complete is presented in cases where the requisite acts of subsequent appropriation<sup>1</sup> are to be performed by the seller, and not by the buyer.<sup>2</sup> And it is said that the ablest judges have been perplexed in cases, not where it is agreed that the purchaser shall select out of the bulk belonging to the vendor,

but where the vendor is, by the express or implied terms of the contract, entitled to make the selection.<sup>3</sup> Under such circumstances the difficulty is declared to be to determine what constitutes the appropriation, or in other words, to find out at what precise time the seller is no longer at liberty to change his intention.<sup>4</sup>

*Deliverable condition and completion of delivery.* And perhaps it might be added that the difficulty goes beyond the mere act of converting the original agreement into a sale of specific goods, and extends to the more general inquiry as to how far a transfer of property is delayed through the seller's omission to put the goods into deliverable condition,<sup>5</sup> and then make full delivery, as contemplated under the agreement.<sup>6</sup>

*Identification, setting apart, etc.* The doctrine laid down upon the subject is that when from the nature of the subject the vendor is to make the appropriation, then the title vests and the sale is complete as soon as any act is done by him identifying the property, and it is set apart by him with the intention unconditionally to apply it in fulfilment of the contract.<sup>7</sup> And it has been held that title to timber passed as fast as it was made and marked, although it was not all delivered, and the buyer failed to send out an agent to accept every part of it as it was made.<sup>8</sup>

1 Acts of appropriation : § 127.

2 2 Schouler on Personal Property, § 260, p. 242.

3 Bennett's Benjamin on Sales, § 353. As in the common mode of doing business where one merchant gives an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many tons of sugar, in which case it becomes the vendor's duty to appropriate the goods to the contract: Bennett's Benjamin on Sales, § 353.

4 Bennett's Benjamin on Sales, § 353. For it is regarded as plain that the vendor's act in simply selecting such goods as he intends to send cannot change the property in them, since he may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him: Bennett's Benjamin on Sales, § 353.



5 See section on PUTTING INTO DELIVERABLE STATE.

6 2 Schouler on Personal Property, § 260. For the rule of subsequent appropriation would be reduced to an easier compass if we suppose the agreement had been for so many hogsheads of sugar, to be set apart by the seller, and held by him subject to the buyer's further orders as to destination, and the goods were either paid for in advance or sold on credit: 2 Schouler on Personal Property, § 260.

7 Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295.

8 Dunning v. Gordon, 4 Up. Can. Q. B. 399; Bennett's Benjamin on Sales, § 360, n. d.

§ 129. *Determining election.* — *Question of law whether intention irrevocably manifested.* It is declared to be a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention which may be changed at his pleasure,<sup>1</sup> or a determination of his right conclusive on him, and no longer revocable.<sup>2</sup>

*General rule on subject of election.* And the general rule on the subject of election is said to be, that when from the nature of an agreement an election is to be made, the party who by the agreement is to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act;<sup>3</sup> and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind.<sup>4</sup>

*By dispatch of goods or other overt act.* It follows from this that where from the terms of an executory agreement to sell unspecified goods the vendor is to dispatch the goods, or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be;<sup>5</sup> and the property is transferred the moment the dispatch or other act has commenced, for then the appropriation is made finally and conclusively by the authority conferred in the agreement,<sup>6</sup> and the certainty, and thereby the property begins by election.<sup>7</sup> Accordingly, when

the right of ascertainment of the goods rested with the vendor, and he had done the outward act which showed which part is to be the vendee's property, as by putting barley into sacks sent by the buyer, it was held that his election was made, and the property passed.<sup>8</sup>

*Not until outward act actually commenced.* But however clearly the vendor may have expressed an intention to choose particular goods, and however extensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced the appropriation is not yet final, for it is not made by the authority of the other party, nor binding on him.<sup>9</sup>

1 See § 123, on APPROPRIATION BY SELLER.

2 Bennett's Benjamin on Sales, § 358.

3 See citations in next note.

4 Bennett's Benjamin on Sales, § 250; citing, Hayward's Case, 2 Coke, 36; Blackburn on Sales, 123; Lynch v. O'Donnell, 127 Mass. 311; Waddell v. McBride, 7 Up. Can. C. P. 382; Coffey v. Quebec Bank, 20 Up. Can. C. P. 110, 555.

5 Blackburn on Sales, 123.

6 See Aldridge v. Johnson, 7 El. & B. 885; Langdell's Cases on Sales, 855, 863.

7 Hayward's Case, 2 Coke, 36.

8 Aldridge v. Johnson, 7 El. & B. 885; Langdell's Cases on Sales, 859, 865, 866.

9 Blackburn on Sales, 123. See Bennett's Benjamin on Sales, § 260, quoting this statement of the law, and declaring its accuracy to have been attested in Aldridge v. Johnson, 7 El. & B. 885, 901, 26 Law J. Q. B. 206, and in Coffey v. Quebec Bank, 20 Up. Can. C. P. 110, 555.

§ 130. *Assent to appropriation.* — *Adoption of acts of selection, separation, etc.* Where it is incumbent upon the seller, by the terms of the agreement, to select and separate, and then notify the buyer, and these acts are done by the seller, the property passes when the buyer accepts the situation, if not before.<sup>1</sup> Thus, the property has been held to pass by reason of an appropriation and assent thereto where the sellers appropriated for the

benefit of the buyer sixteen hogsheads of sugar out of twenty hogsheads, to be prepared or filled up by the sellers, and communicated the fact of such appropriation to the buyer, desiring him to take the goods, and he adopted that act of the sellers, and said he would send for the goods as soon as he could.<sup>2</sup>

*Dispatching goods.* But it is questionable whether this assent on the buyer's part is necessary to complete the appropriation, since in many cases dispatching the separated goods, under circumstances favoring the supposition that the seller meant to shift the property, has been held to make the appropriation complete, without waiting for the buyer's distinct assent.<sup>3</sup>

*Putting into buyer's receptacles.* So it has been held that the seller, by putting barley into sacks which the buyer had sent to be filled, completed the selection on his part, and that there had been full appropriation as to those sacks, which the seller could not afterwards disturb.<sup>4</sup> And where the contract was for peppermint oil, to be put into bottles furnished by the buyer, the filling of the bottles by the seller was held a complete appropriation of specific goods to the contract.<sup>5</sup>

*Inquiry concerning nature of conveyance.* Yet in a case which has been found difficult to reconcile with others, and whose authority has been doubted, the doctrine appears to be laid down that although the seller has separated the goods and placed them aside, and then has written to the buyer to ask by what conveyance the goods shall be sent, but before receiving an answer goes into bankruptcy, the property does not pass, because the buyer has not assented to the appropriation.<sup>6</sup>

*Need of.* And it was subsequently declared in holding that the ear-marking of cotton sent to a warehouse for the buyer was insufficient to pass the property where the buyer afterwards repudiated the contract on the

ground that the cotton did not correspond with the sample, that there must not only be an appropriation, but an appropriation assented to by the vendee.<sup>7</sup>

*Anticipative, implied, etc.* It was admitted, however, that the assent of the vendee may be given prior to the appropriation by the vendor;<sup>8</sup> that it may be either express or implied; and that it may be given by an agent of the party,<sup>9</sup> as by a warehouseman or wharfinger.<sup>10</sup>

*Seller's agency for.* And the inference to be drawn from the language used in later English cases is said to be that the purchaser may, by his conduct, make the seller his agent both to appropriate and give in advance whatever assent may be necessary on his own part;<sup>11</sup> and the same view would seem to prevail in America,<sup>12</sup> though in most parts of this country, in cases involving the right of property under such circumstances, mutual intent as a question of fact would be taken as the material issue.<sup>13</sup>

*Statement of necessity of.* It has been declared in England to be established that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to by both vendor and vendee, and that nothing passes until there has been an assent, express or implied, on the part of the vendee.<sup>14</sup>

1 See *Rohde v. Thwaites*, 6 Barn. & C. 388; *Langdell's Cases on Sales*, 133, 140; 2 *Schouler on Personal Property*, § 261; referring also to *Wilkins v. Bromhead*, 6 Man. & G. 963; *Langdell's Cases on Sales*, 838.

2 *Rohde v. Thwaites*, 6 Barn. & C. 388; *Langdell's Cases on Sales*, 133.

3 See *Fragano v. Long*, 4 Barn. & C. 219; *Langdell's Cases on Sales*, 798; *Sparkes v. Marshall*, 2 Bing. N. C. 671; so cited, 2 *Schouler on Personal Property*, § 261.

4 *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859.

5 *Langton v. Higgins*, 4 Hurl. & N. 402; *Langdell's Cases on Sales*, 867.

6 *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801, 804, 805; discussed, *Bennett's Benjamin on Sales*, § 370; 2 *Schouler on Personal Property*, § 261; *Wilkins v. Bromhead*, 6 Man. & G. 963; *Langdell's Cases on Sales*, 838, 842.

7 *Campbell v. Mersey Docks*, 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875; citing, *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970.

8 See suggestion that there may be an anticipative assent, in *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 850, 864.

9 See *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 882.

10 *Campbell v. Mersey Docks*, 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875.

11 See *Browne v. Hare*, 3 Hurl. & N. 484; 4 Hurl. & N. 822; *Langdell's Cases on Sales*, 976, 989; *Tregelles v. Sewell*, 7 Hurl. & N. 571; *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322; *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 882.

12 2 *Schouler on Personal Property*, § 262, whence paragraph derived.

13 See *Buswell v. Green*, 1 Dutch. 390; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 195; *Hyde v. Lathrop*, 2 Abb. N. Y. App. 436; *Birge v. Edgerton*, 28 Vt. 291.

14 *Campbell v. Mersey Docks*, 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 874, 875. Referring as among the authorities to *Hanson v. Meyer*, 6 East, 614; *Langdell's Cases on Sales*, 639; *Rugg v. Minett*, 11 East, 210; *Langdell's Cases on Sales*, 647; *Rohde v. Thwaites*, 6 Barn. & C. 388; 9 Dowl. & R. 293; *Langdell's Cases on Sales*, 138.

§ 131. *Acts of assent.—Acceptance of bill of lading.* The subsequent appropriation of a parcel of butter has been held to have been completed by mutual assent, where the quantity, quality, and price of the goods were all specified in the invoice, and the bill of lading was regularly indorsed to the buyers and accepted by them.<sup>1</sup> Hence, the greatest part of the goods having been lost by shipwreck, it was held that the property had passed, and that an action for goods bargained and sold was maintainable, although the goods were not in the possession of the sellers at the time of the contract, and there had been a delay in shipment, which was, however, found to have been waived, and although the payment was to be by bill at two months after landing.<sup>2</sup>

*Ordering agent to insure goods.* So there has been considered to be an unequivocal appropriation of black

oats to the purchaser by a letter informing him that room on a schooner had been engaged for the oats, and an assent to this appropriation and adoption thereof, by the action of the agent on the next day in ordering his agent to effect insurance on such oats.<sup>3</sup>

*No authority to seller or warehouseman, etc.* Where besides a sale and delivery of two packets of hops of one variety, a further sale was made by sample of two packets of another variety out of three lying in a warehouse, and the vendor's son instructed the warehouseman to set apart two of the three packets for the purchaser, whereupon the warehouseman placed on them a "wait order card," that is, a card upon which was written, "to wait orders," and the name of the vendee, but no alteration was made in the warehouse books, while the vendor still remained liable for the rent, and the vendor afterwards sent the buyer an invoice speaking of "the last two packets of hops," therein described as "lying at your order," and also a draft for acceptance, but the buyer returned the bill unsigned, it was held that there was no previous authority to the seller to select the goods given, or to the warehouseman to accept them, and hence there was no assent to the appropriation thereof,<sup>4</sup> and that the buyer had not waived the right to object to the want of correspondence of the hops with the sample, or to insist on the weight being ascertained before the property passed.<sup>5</sup>

1 *Alexander v. Gardner*, 1 Bing. N. C. 671; *Langdell's Cases on Sales*, 810, 813. And compare *Wilkins v. Bromhead*, 6 Man. & G. 963; *Langdell's Cases on Sales*, 838, 842.

2 *Alexander v. Gardner*, 1 Bing. N. C. 661; *Langdell's Cases on Sales*, 810, 813; following, *Rohde v. Thwaites*, 6 Barn. & C. 383; *Langdell's Cases on Sales*, 138; *Fragano v. Long*, 4 Barn. & C. 210; *Langdell's Cases on Sales*, 798.

3 *Sparkes v. Marshall*, 2 Bing. N. C. 761.

4 *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 882, 883.

5 *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 882, 883; distinguishing case next cited, on the ground that there the bulk of the barley had been inspected and approved, and all that remained to be done was to sever and measure the portion to be appropriated to the vendee, and that the vendor had done so by filling a number of sacks sent by the vendee, so that extensive authority was conferred on the vendor, and the property passed, with the assent of both parties: See *Aldridge v. Johnson*, 4 El. & B. 885; *Langdell's Cases on Sales*, 859.

§ 132. *Restricted appropriation, etc.*—*Appropriation of part.* Where the seller of barley, to whom bullocks had been delivered in part exchange therefor, filled a portion, amounting to about half, of the sacks sent by the buyer, but was at first delayed in means of transportation, and afterwards telegraphed orders to allow no more barley to go, and turned it all out of the sacks, so as to be undistinguishable from the rest of the heap,<sup>1</sup> it was held, in an action of detinue and trover by the buyer against the assignees of the bankrupt seller, that there had been appropriation sufficient to pass the property in the sacks which were filled, but not in regard to the rest of the barley.<sup>2</sup>

*Conditional appropriation.* Where on a sale of five tons of oil, "to be free delivered and paid for in fourteen days," it was by the seller's direction transferred to the buyer's order by the seller's wharfinger, who thought the property had passed, and delivered the whole to the buyer, although after a part delivery had been procured by the buyer, a countermand had come from the seller because the buyer had refused to give his check for the price, and had retained the wharfinger's notice of transfer, it was held that the delivery was not made which would complete the appropriation of the goods to the contract and pass the property, as it was conditional on the giving of a check.<sup>3</sup>

*Erroneous appropriation.* Where a broker for a newly arrived cargo of five hundred bales of cotton had himself purchased two hundred and fifty bales,

which had been landed and continuously numbered by the company at whose docks the vessel had arrived, and on paying for the cotton had received from the company an indorsed warrant or certificate of warehousing for two hundred and fifty bales of cotton described as being numbered from one to two hundred and fifty, together with a delivery order for the same goods, but the buyer to whom the broker had resold the cotton, to whom the documents mentioned had been sent, repudiated the contract on the ground that the cotton did not correspond with the samples, and thereupon the seller learnt that the company had inadvertently delivered two hundred of the bales in controversy to other parties, and sued the company for conversion of the cotton bought by him, it was held that a verdict for the company, substantially on the ground of an appropriation by mistake, was sustainable,<sup>4</sup> and declared that the finding of the jury was proper upon the question whether any evidence of appropriation did not arise from a mistake of one of the company's clerks, which mistake had been permitted to be shown.<sup>5</sup>

1 *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859.

2 *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859, 864, 865. Distinguished on ground of authority conferred to complete appropriation: *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 881, 882. See, also, *Bennett's Benjamin on Sales*, § 370, notes, *t, u*; referring to *Ropes v. Lane*, 9 Allen, 509, 510; *Mason v. Thompson*, 18 Pick. 305; *Bond v. Greenwald*, 4 Heisk. 453; *Rapley v. Adees*, 1 Thomp. & C. 127; *Gibb v. Belche*, 62 Mo. 400; *Butler v. Stanley*, 21 Up. Can. C. P. 402.

3 *Godts v. Rose*, 17 Com. B. 229; 25 Law J. Com. P. 61; *Langdell's Cases on Sales*, 970, 973, 974. Cited to show that there must not only be an appropriation, but an appropriation assented to by the vendee, in *Campbell v. Mersey Docks*, 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875.

4 *Campbell v. Mersey Docks Co.* 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875.

5 *Campbell v. Mersey Docks Co.* 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875. But assuming that there was an appropriation, it seemed to be considered that an assent to such an appropriation was requisite: *Campbell v. Mersey Docks Co.* 14 Com. B. N. S. 412; *Langdell's Cases on Sales*, 873, 875.



§ 133. *Conformity to contract.—Variance from order.* Where one thing is ordered and another sent, there can be in the setting apart by the seller no perfect sale, and consequently no binding appropriation of specific goods to the contract;<sup>1</sup> and any subsequent acceptance by the buyer of goods sent in fundamental variance from his original order, or of goods sent to replace what has once been appropriated to the contract,<sup>2</sup> evince really a substituted bargain<sup>3</sup> between the parties.<sup>4</sup>

*Late delivery, excess in quantity, different description.* And hence if goods are delivered unreasonably later than the time set,<sup>5</sup> or in excess of the quantity named,<sup>6</sup> or of an altogether different description from those ordered,<sup>7</sup> the party ordering the goods may refuse to receive them,<sup>8</sup> for it cannot be maintained that the seller, whose duty it was to select and separate has any right to throw the selection from a larger quantity upon the buyer,<sup>9</sup> or stand upon his own misappropriation of goods to the contract.<sup>10</sup>

*Sale by sample.* So where a sale is made by sample,<sup>11</sup> and the buyer has not abandoned his right of comparing the bulk<sup>12</sup> with the sample, or of verifying the weight,<sup>13</sup> the seller cannot sue him for goods bargained and sold, merely by setting aside the specific portion to await orders, and then sending an invoice to the buyer, with a draft for the price, which the latter refuses to accept.<sup>14</sup>

*Conditional appropriation.* And where the appropriation is upon condition, as of payment by check, the title does not pass so as to enable the buyer to sue as owner, unless full delivery to that purport is made by or under the authority of the seller.<sup>15</sup>

1 2 Schouler on Personal Property, § 263.

2 See *Smith v. Myers*, Law R. 5 Q. B. 429; Law R. 7 Q. B. 139.

3 See *Cunliffe v. Harrison*, 6 Ex. 903; *Langdell's Cases on Sales*, 844, 846.

4 2 Schouler on Personal Property, § 263.

5 See *Gath v. Lees*, 3 Hurl. & C. 553; *Rommell v. Wingate*, 103 Mass. 327.

6 See *Rommell v. Wingate*, 103 Mass. 327; *Cunliffe v. Harrison*, 6 Ex. 903; *Langdell's Cases on Sales*, 844; *Levy v. Green*, 1 El. & E. 969; 27 Law J. Q. B. 111.

7 See *Levy v. Green*, 1 El. & E. 996; 28 Law J. Q. B. 399.

8 2 Schouler on Personal Property, § 263.

9 See *Bennett's Benjamin on Sales*, § 376, referring to *Croninger v. Crocker*, 62 N. Y. 151, and stating *Eaton v. Gay*, 44 Mich. 431.

10 2 Schouler on Personal Property, § 263; citing, *Cunliffe v. Harrison*, 6 Ex. 903; *Langdell's Cases on Sales*, 844; *Levy v. Green*, 1 El. & E. 969; 27 Law J. Q. B. 111; *Downer v. Thompson*, 2 Hill, 137; *Langdell's Cases on Sales*, 893; *Rommell v. Wingate*, 103 Mass. 327.

11 Sale by sample: See 2 *Bouvier Law Dict.* tit. Sample (14th ed.) 497.

12 See *Heilbutt v. Hickson*, Law R. 7 Com. P. 438; *Couston v. Chapman*, Law R. 2 Sc. App. 250; *Grimoldby v. Wells*, Law R. 10 Com. P. 391.

13 Compare *Aldridge v. Johnson*, 7 El. & B. 885; *Langdell's Cases on Sales*, 859; as distinguished, *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 881.

14 *Jenner v. Smith*, Law R. 4 Com. P. 270; *Langdell's Cases on Sales*, 877, 882; as noted, 2 Schouler on Personal Property, § 263; also stated, *Campbell on Sales*, 238.

15 *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970, 974; as stated, 2 Schouler on Personal Property, § 263.

§ 134. **Excess in quantity of goods.**—*No binding appropriation.* Since the goods sent must conform to the terms of the contract or order,<sup>1</sup> there is no binding appropriation where ten hogsheads of claret were ordered, and fifteen hogsheads were sent;<sup>2</sup> or where two hundred and fifty barrels of cement were ordered, and two hundred and sixty barrels were sent.<sup>3</sup>

*Further instances.* The same result arises where three hundred and ninety-two tons of coal were shipped, instead of a cargo of three hundred and seventy-five tons offered and ordered, and the shipper did not begin to load until nine days after the receipt of a telegram requiring immediate loading,<sup>4</sup> or where the goods sent in excess of those ordered were articles entirely different though packed in the same crate, and a rejection of the whole was sustained.<sup>5</sup>

- 1 See *Wait v. Baker*, 2 Ex. 1 ; *Langdell's Cases on Sales*, 942, 945.
- 2 *Cunliffe v. Harrison*, 6 Ex. 903 ; *Langdell's Cases on Sales*, 844.
- 3 *Downer v. Thompson*, 2 Hill, 137 ; *Langdell's Cases on Sales*, 893.
- 4 *Rommell v. Wingate*, 103 Mass. 327.

5 *Levy v. Green*, 1 El. & E. 996 ; 23 Law J. Q. B. 319. See statements of cases in *Bennett's Benjamin on Sales*, § 376 ; citing, also, *Tarling v. O'Riordan*, 2 Law Rec. 82 ; *Shannon v. Barlow*, 9 Irish Jur. N. S. 229.

§ 135. *Substitution of other goods. — Destroyed goods.* Where goods appropriated to the contract were destroyed by an earthquake while at the port of lading, it was held that a contract covering this specific lot was not supplied by a similar cargo afterwards shipped by the same vessel.<sup>1</sup>

*Rejected goods.* But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, does not prevent the vendor from afterwards, within the time limited for so doing, appropriating and tendering other goods which are in accordance with the contract.<sup>2</sup> Thus where the vendors being bound by contract to tender a cargo of maize to the vendees, tendered a cargo which was rejected as not being in accordance with the contract, and afterwards, and within the time limited for so doing, the vendors tendered a cargo which was in accordance with the contract, it was held that this second tender was good, and that the vendees were bound to accept it.<sup>3</sup>

1 *Smith v. Myers*, Law R. 5 Q. B. 429 ; Law R. 7 Q. B. 139 ; as noted, 2 *Schouler on Personal Property*, § 263, p. 246.

2 *Bennett's Benjamin on Sales*, § 376 *a*, stating case next noted.

3 *Borrowman v. Free*, Law R. 4 Q. B. D. 500 ; distinguishing, *Gath v. Lees*, 3 Hurl. & C. 558. Compare *Campbell on Sales*, 237.

§ 136. *Delivery as showing appropriation, etc. — Significance of.* Among circumstances highly significant in establishing full appropriation and a transfer of title besides are delivery of possession on the seller's part, or carrying the goods to the place where the buyer had to

call for them.<sup>1</sup> Thus a delivery to the buyer or his agent, or to a common carrier consigned to him, may be a sufficient appropriation of the goods.<sup>2</sup>

*Possession given for purpose of separation.* And where part of an entire mass of goods, such as coal, brick, or grain, is sold, and the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to that part passes to the purchaser,<sup>3</sup> and he may retain the whole till he has had sufficient time to separate and take the part which belongs to him.<sup>4</sup>

*Bill of sale.* Delivery of an absolute bill of sale of the goods<sup>5</sup> is often tantamount in this connection to a transfer of title.<sup>6</sup>

*Dispatching goods.* So it has been held that there was a change of risk, and that the property to goods, ordered to be dispatched on insurance being effected, terms to be three months' credit from the time of arrival, passed to the buyers when the goods left the vendor's warehouse, marked with the buyer's initials, and were sent by canal to the vendor's shipping agents in another city, with directions to forward to the foreign buyer.<sup>7</sup>

1 2 Schouler on Personal Property, § 264. And in fact doing all that was incumbent on the seller, yet reserving no right on his part : 2 Schouler on Personal Property, § 264.

2 See Merchants' Nat. Bank v. Bangs, 103 Mass. 291, 295. See next section on DELIVERY TO CARRIER.

3 See citations in next note.

4 Lamprey v. Sargent, 58 N. H. 241 ; Weld v. Cutler, 2 Gray, 195 ; 2 Schouler on Personal Property, § 264 ; referring also to Washburn Iron Co. v. Russell, 130 Mass. 543.

5 Bill of sale : See that title ; Bouvler Law Dict. (14th ed.) 207.

6 Paine v. Young, 56 Md. 314 ; so cited, 2 Schouler on Personal Property, § 264.

7 Fragano v. Long, 4 Barn. & C. 219 ; Langdell's Cases on Sales, 798, 799, 800.

§ 137. *Delivery to carrier. — Where contract silent.* Should the contract be silent as to the person or mode

by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee.<sup>1</sup>

*Sufficiency of appropriation.* And in general a delivery to the buyer,<sup>2</sup> or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be a sufficient appropriation of the goods.<sup>3</sup>

*Form of bill of lading.* If the bill of lading,<sup>4</sup> or other written evidence of the delivery to the carrier, be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee.<sup>5</sup> But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in course of transportation to the place of destination by delivery to a carrier, and the appropriation which he then makes<sup>6</sup> is said to be provisional or conditional.<sup>7</sup>

*Reservation of control.* Thus, he may take the bill of lading or carrier's receipt in his own or some agent's name, to be transferred, on payment of the price, by his own or his agent's indorsement to the purchaser, and in all cases when he manifests an intention to retain this *jus disponendi*,<sup>8</sup> the property will not pass to the vendee.<sup>9</sup>

1 *Magruder v. Gage*, 33 Md. 344; 3 Am. Rep. 177, 180. And see *Dutton v. Solomonson*, 3 Bos. & P. 582, 584; *Krulder v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402.

2 See *Washburn Iron Co. v. Russell*, 130 Mass. 543, 544.

3 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. And see *Wigton v. Bowley*, 130 Mass. 252, 254.

4 Bill of lading: See that title; *Bouvier's Law Dict.* (14th ed.) 204.

5 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. And see *Griffith v. Ingledew*, 6 Serg. & R. 429; *Wigton v. Bowley*, 130 Mass. 252, 254; *Hobart v. Littlefield*, 13 R. I. 341, 346.

6 See *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Langdell's Cases on Sales*, 825, 929.

7 Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295.

8 See Wigton v Bowley, 130 Mass. 252, 254.

9 Merchants' Nat. Bank v. Bangs, 102 Mass. 291, 295. And see First Nat. Bank v. Crocker, 111 Mass. 163, 167.

§ 138. **Delivery "free on board."** — *Indorsement of bill of lading taken to consignor's order.* The property may pass by an act of the vendor alone, as well as by the act of the vendor communicated to the purchaser,<sup>1</sup> or by the mutual consent of both parties, according to the terms of the contract;<sup>2</sup> and where a quantity of the "best refined rape oil" is ordered, and a specific quantity shipped "free on board" a vessel, the title and risk passes by such delivery of goods originally unas-  
certained,<sup>3</sup> and there is not necessarily a retention of control,<sup>4</sup> although the bill of lading was taken to the consignor's order and then indorsed over to his agent.<sup>5</sup>

*Cargo made deliverable to third party's order.* But it has been held that notwithstanding a provision in the contract for the purchase of all the ore of a mine to be shipped "free on board" vessels chartered by buyers or seller, payment of the price for successive shipments of ore, covering the full amount due, could not *per se* operate to transfer to the buyers the property in a subsequent shipment of ore on vessels chartered by the buyers, in the absence of proof of a prior appropriation thereof, when the shipper in dealing with the bills of lading manifested his intention to reserve the *jus disponendi*,<sup>6</sup> by making the cargo deliverable to the order of a third party.<sup>7</sup>

*When not condition precedent.* Yet where the goods are not specified at the time of the contract, though deemed to have been subsequently appropriated, it has been said that a stipulation for delivery "free on board" was not a condition precedent<sup>8</sup> to the passing of the title,<sup>9</sup> but was a collateral and superadded contract to be performed afterwards.<sup>10</sup>

*Only part of goods embarked.* So where the offer accepted and filled was for fifty bales of cotton "free on board, and freight," it was held that delivery to the buyer was complete, and the title was in him, though only part of the cotton was embarked, and the rest was burned on the dock.<sup>11</sup>

*Buyer's vessels not ready for goods.* And arrangements for delivery "free on board," etc., may so change the risk as to create liability for warehouse charges where the buyer's vessels are not ready to take the goods.<sup>12</sup>

*Low water preventing transportation.* But a failure to transport barges loaded with coal, on account of the lowness of the water, where the terms were cash when delivered, free of all charge, will prevent the title from passing to the vendee as against the vendor's attaching creditors.<sup>13</sup>

*Effect on seller's lien, etc.* Delivery "free on board" a vessel of goods otherwise appropriated to the contract, if its completion is not prevented by such intervention as the agency of the elements, thus transfers the title and risk, unless the form in which the bill of lading is taken distinctly shows a design to reserve the *jus disponendi*;<sup>14</sup> but delivery "free on board" a vessel does not divest the seller's lien,<sup>15</sup> if the receipt for the goods is in the seller's name,<sup>16</sup> unless the vessel belonged to the purchaser.<sup>17</sup>

1 See § 130, on ASSENT TO APPROPRIATION.

2 *Browne v. Hare*, 3 Hurl. & N. 484; 4 Hurl. & N. 822; Langdell's Cases on Sales, 976, 989. And see *Aldridge v. Johnson*, 7 El. & B. 885; Langdell's Cases on Sales, 859, 864.

3 Change of title and risk: See under chapter on TRANSFER OF TITLE.

4 Reservation of *jus disponendi*: See subsequent chapter of book.

5 *Browne v. Hare*, 3 Hurl. & N. 484; 4 Hurl. & N. 822; Langdell's Cases on Sales, 976, 989. So that the buyer was held liable for the loss of the oil by the running down of the vessel, though the seller's agent, a merchandise broker, delivered the bills of lading, etc., after he knew that the vessel was lost: *Browne v. Hare*, 3 Hurl. & N. 484.

6 Compare *Ogg v. Shuter*, Law R. 1 C. P. D. 47; reversing, S. C. Law R. 10 Com. P. 159.

7 *Gabarron v. Kreeft*, Law R. 10 Ex. 274.

8 Compare *Hobart v. Littlefield*, 13 R. I. 341.

9 Condition precedent: See under chapter on CONDITIONAL SALES.

10 *Coleman v. McDermot*, 5 Up. Can. C. P. 303. And see *Howland v. Brown*, 13 Up. Can. Q. B. 199.

11 *Hobart v. Littlefield*, 13 R. I. 341. But compare *Sneathen v. Grubbs*, 88 Pa. St. 147.

12 *Howland v. Brown*, 13 Up. Can. Q. B. 199.

13 *Sneathen v. Grubbs*, 88 Pa. St. 147. Statements of foregoing cases: *Bennett's Benjamin on Sales*, §§ 363, n. i, 372, n., 398, n. a. See also following cases therein cited, discussing delivery "free on board" in various phases: *Wilmot v. Wadsworth*, 10 Up. Can. Q. B. 594, 599; *George v. Glass*, 14 Up. Can. Q. B. 514, 519; *Clark v. Rose*, 29 Up. Can. Q. B. 168, 178. (Buyer's duty to pay or tender price.) *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115, 125. (Buyer's duty to provide cars.)

14 See previous citations in section.

15 Seller's lien: See subsequent chapter of book.

16 *Craven v. Ryder*, 6 Taunt. 433; *Ruck v. Hatfield*, 5 Barn. & Ald. 632.

17 *Cowasjee v. Thompson*, 5 Moore P. C. C. 165. Effect of delivery "free on board," etc., on right of stoppage *in transitu*: See *Berndtson v. Strang*, Law R. 4 Eq. 481; 3 Ch. 588; 36 Law J. Ch. 874; *Ex parte Rosevear China Clay Co.* Law R. 11 Ch. D. 560.

§ 139. **Dispatching goods.**—*As passing title.* It has been said in England that when goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off.<sup>1</sup> This is stated to be the case, because a seller who charges for the carriage of goods is presumed to have intended keeping control of them during the transit, and so prevented the property from passing,<sup>2</sup> while the presumption would be to the contrary if the carrier's charges were to be adjusted between himself and the buyer.<sup>3</sup>

*Delivery to carrier.* So it has treated as settled law in that country that where a vendor delivers goods to a carrier, by order of the purchaser, the appropriation is determined; the delivery to a carrier is a delivery to the vendee, and the property vests immediately;<sup>4</sup> and in the United States the law is established to the same effect.<sup>5</sup>



*Bullion billed, shipped, etc.* But in the absence of a bill of lading or a letter, or notice from the consignor to the consignee, informing him of the shipment of bullion, the mere fact that bullion is "billed, shipped, marked, and consigned" to a party, is not such an appropriation of the property to the contract as completes a bargain and sale, and delivers the possession of the property to the purchaser.<sup>6</sup>

*Goods sent on trial or under conditions.* And whenever the goods are sent on trial or under contract of "sale or return," or with special conditions imposed, the property in the goods remains still in the seller during their transit.<sup>7</sup>

1 *Fragano v. Long*, 4 Barn. & C. 219; Langdell's Cases on Sales, 798, 800. See section on DELIVERY "FREE ON BOARD."

2 2 Schouler on Personal Property, § 264, whence paragraph derived.

3 See *Dunlop v. Lambert*, 6 Clark & F. 600; *Blanchard v. Page*, 8 Gray, 281.

4 *Dutton v. Solomonson*, 3 Bos. & P. 582. And see *Cork Distilleries Co. v. Great Southern etc. Ry. Co.* Law R. 7 H. L. 269; *Johnson v. Lancashire etc. Ry. Co.* Law R. 3 Com. P. D. 499. Discussion of appropriation by execution of order for a shipment of goods: *Campbell on Sales*, 236-240.

5 *Krulder v. Ellison*, 47 N. Y. 36; *Bennett's Benjamin on Sales*, § 362, citing also cases in last note, and referring to following American cases: *Me.* — *Barry v. Palmer*, 19 Me. 303; *Wing v. Clark*, 24 Me. 366; *Torrey v. Corliss*, 33 Me. 336. *Vt.* — *Strong v. Dodds*, 47 Vt. 348. *N. H.* — *Woolsey v. Bailey*, 27 N. H. 217; *Smith v. Smith*, 27 N. H. 244, 252; *Garland v. Lane*, 46 N. H. 245, 248; *Arnold v. Print*, 51 N. H. 587, 589; *Mass.* — *Stanton v. Eager*, 16 Pick. 467; *Putnam v. Tillotson*, 13 Met. 517; *Hunter v. Wright*, 12 Allen, 548; *Kline v. Baker*, 90 Mass. 253, 254; *Johnson v. Stoddard*, 100 Mass. 306, 308; *Odell v. Boston etc. R. R.* 103 Mass. 50; *Suit v. Woodhall*, 113 Mass. 394. *N. Y.* — *Ludlow v. Bauns*, 1 Johns. 15; *Rodgers v. Phillips*, 40 N. Y. 519. *Mo.* — *Armen-trout v. St. Louis Ry. Co.* 1 Mo. App. 158. *Ill.* — *Stafford v. Walter*, 67 Ill. 83; *Devine v. Edwards*, 101 Ill. 138.

6 *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51.

7 2 Schouler on Personal Property, § 264; citing, *Swain v. Shepherd*, 1 Moody & R. 223.

§ 140. *Handing over documents.* — *Bill of lading and policy of insurance.* Where the contract of sale was made at London between residents thereof, and the goods bought were taken at a designated price per ton,

“delivered at Harburg, cost, freight, and insurance, payment by net cash in London, less freight, upon handing the bill of lading and policy of insurance,” and the document was described which was “to be taken by the buyers as a voucher for the quantity shipped,” it was held that by the true construction of this sale the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser,<sup>1</sup> and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser.<sup>2</sup>

*Payment of part of price contingent on arrival of goods.* And in a case which caused a marked division of opinion, both originally and on appeal, where from the terms of the contract of sale of coals supplied to a company the selection of the particular description to be at the company's option, it was regarded as clear that the coals were to be shipped in England, on board a vessel to be engaged by the shipper, to be insured, and the policy of insurance and bill of lading and invoice to be handed over to the company to which the coals were furnished, it was considered in the opinion which was approved by the majority of the judges, and was the basis of the final judgment, that as soon as the vendor, in pursuance of these stipulations, gave the company the policy and bill of lading, he irrevocably appropriated to the contract the goods which were thus shipped, insured, and put under the control of the company;<sup>3</sup> and that the *prima facie* construction of the contract that the parties intended the property in the coals vested in the company, and the right to the price in the vendor, as soon as the contract came to relate to specific ascertained goods, that is, on the handing over of the documents mentioned, was not contradicted by any sufficient indication of a contrary intention in the contract, but that

the goods were sold and delivered, and at the risk of the company, though the payment of a remaining half of the price was contingent on completion of the delivery at a port in India.<sup>4</sup>

1 *Tregelles v. Sewell*, 7 Hurl. & N. 871.

2 *Tregelles v. Sewell*, 7 Hurl. & N. 571. As stated, Bennett's Benjamin on Sales, § 373.

3 *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322; S. C. 33 Law J. Q. B. 214. For, since after this the vendor could never have been required to ship another cargo for the company, and would not have had the right to do so, it was declared that from that time what had originally been an agreement to supply any coals answering the description became an agreement relating to the particular coals in controversy only, just as much as if the coals had been specified from the first: *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322.

4 *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322; S. C. 33 Law J. Q. B. 214. This view was maintained, although the vessel which sailed for that port never arrived at her destination, and the coals were never delivered in conformity with the contract: *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322. Other opinions were to the effect that the coals when shipped were specifically appropriated to the contract, and that the property therein passed, subject to the vendor's lien for the price, to the company, which by the transfer of the bill of lading obtained dominion over the cargo, and could have disposed of it at their pleasure, but that the vendor, on account of his breach of the contract to make delivery at the port of destination, was bound to return the half of the price already paid, and to lose his claim for the remainder; and on the other hand, that the whole cargo remained the property of the vendor at his risk, and the transfer of the documents was as a security to protect the company for its advance on the price: *Calcutta Company v. De Mattos*, 32 Law J. Q. B. 322. See statements of case in Bennett's Benjamin on Sales, § 374; 1 Corbin's Benjamin on Sales, §§ 501, 503; case cited, Campbell on Sales, 229.

§ 141. *Accepting or discounting bill of exchange.* — *Appropriation of money to particular goods.* Where a bill of exchange was accepted by the purchaser on account of goods ordered from a manufacturer which were afterwards completed and loaded on barges to be forwarded to the purchaser, but the manufacturer becoming bankrupt, trover was brought for the goods by his assignees, it was held that though the goods were made, yet until the money paid was appropriated to these particular goods, the purchaser could not have maintained trover for them, if they had even been sold to another person.<sup>1</sup>

*Discounting bill of exchange attached to bill of lading.* But where a bill of exchange attached to bills of lading is discounted by a party on the faith of the bills of lading, this has been held to constitute an appropriation of the goods mentioned in the bill of lading,<sup>2</sup> and the consignee cannot, having notice of these facts, sell the goods to a third person to satisfy an antecedent debt.<sup>3</sup>

1 Bishop v. Crawshay, 3 Barn. & C. 415.

2 See citations in next note.

3 See Holmes v. German Security Bank, 87 Pa. St. 525; Holmes v. Bailey, 92 Pa. St. 57; First Nat. Bank v. Pettit, 9 Heisk. 447; First Nat. Bank v. Bensley, 9 Biss. 378, 383. Source of foregoing statements and authorities: Bennett's Benjamin on Sales, § 378. Bill of lading in general: See subsequent chapter on DOCUMENTS OF TITLE.

## CHAPTER XII.

## RESERVATION OF CONTROL.

- § 142. In general.
- § 143. Evidence of intention.
- § 144. Passing of title to buyer.
- § 145. Rights of seller's transferee.
- § 146. Effect of delivery to carrier.
- § 147. Bill of lading to seller's order.
- § 148. Delivery on board buyer's vessel.
- § 149. Disposition of bill of exchange.
- § 150. Transmission to buyer of indorsed bill of lading.
- § 151. Transmission to secure advances.
- § 152. Seller's transmission to agent of bill of lading, etc.

§ 142. In general. — *By seller's taking bill of lading to his own order, etc.* In the case of a contract for sale of chattels not specific, the delivery by the vendor to a common carrier, or shipment on board a vessel belonging to the purchaser or chartered by him, unless the effect of the shipment is restrained by the terms of the bill of lading, is an appropriation sufficient to pass the property.<sup>1</sup> But if the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, so that there is no final appropriation,<sup>2</sup> and the property does not on shipment pass<sup>3</sup> to the purchaser.<sup>4</sup>

*Dealing with bill of lading to secure price.* So, if the vendor deals with the bill of lading, or claims to retain it in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be de-

livered to the purchaser till acceptance or payment of the latter, the appropriation is not absolute,<sup>5</sup> but until acceptance of the draft, or payment or tender of the price is conditional only.<sup>6</sup> But in such a case the goods shipped for the purpose of completing the contract do vest in the purchaser on payment or tender of the contract price.<sup>7</sup>

1 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201, 203.

2 See *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *First Nat. Bank v. Crocker*, 111 Mass. 167.

3 See *Farmers' etc. Bank v. Logan*, 74 N. Y. 568, 578.

4 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201, 203. The vendor in such a case has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein: *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172. Accordingly, where the vendors had dealt with the goods for their own benefit, it was held that the purchaser had no property in the goods, though he had offered to accept bills for the price, or had paid it: See *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942; *Ellershaw v. Magniac*, 6 Ex. 570; *Langdell's Cases on Sales*, 835; *Gabarron v. Kreeft*, Law R. 10 Ex. 274.

5 See *Farmers' etc. Bank v. Logan*, 74 N. Y. 568, 579, and citations in next note.

6 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201, 203. And until such acceptance or payment of tender, the property in the goods does not pass to the purchaser: *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172. See *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Langdell's Cases on Sales*, 952; *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; *Langdell's Cases on Sales*, 996; *Ogg v. Shuter*, Law R. 1 C. P. D. 47. Consult, also, *Dows v. Nat. Exchange Bank*, 91 U. S. 618; *Security Bank v. Lutgen*, 29 Minn. 363; *Marine Bank v. Wright*, 48 N. Y. 1.

7 *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201, 203. For there is then a performance of the condition subject to which the appropriation is made, and everything is done which according to the intention of the parties is necessary to transfer the property: *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172. Consult, also, *Halliday v. Hamilton*, 11 Wall. 560; *Treadwell v. Anglo-American Packing Co.* 13 Fed. Rep. 22.

§ 143. Evidence of intention.—*Provisional or conditional appropriation allowed.* The doctrine upon the subject of the reservation of dominion has been declared to be that the vendor may make a provisional or conditional appropriation of the goods, and retain his hold upon them to secure payment of the price, al-

though he puts them in course of transportation to the place of destination by delivery to a carrier.<sup>1</sup> And in all cases where he manifests an intention to retain this *jus disponendi* the property will not pass to the vendee.<sup>2</sup>

*Difficulty in ascertaining intention.* But practically the difficulty is to ascertain, when the evidence is meager or equivocal, what the real intention of the parties was at the time.<sup>3</sup>

*Generally question of fact for jury.* And this is properly a question of fact for the jury, under proper instructions,<sup>4</sup> and must be submitted to them, unless it is plain as a matter of law that the evidence will justify a finding but one way.<sup>5</sup>

*Effect of making bill of lading deliverable to seller's order.* The fact of making the bill of lading deliverable to the order of the vendor is said to be, when not rebutted by evidence to the contrary, almost decisive to show his intention to preserve the *jus disponendi*, and to prevent the property from passing to the vendee.<sup>6</sup>

1 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. Thus, he may take the bill of lading or carrier's receipt in his own or in some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser: *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. And see *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 134, 172; 31 Eng. Rep. 291, 293. See also preceding section on RESERVATION OF CONTROL IN GENERAL.

2 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. And see *Wigton v. Bowley*, 130 Mass. 252, 254. Transfer of title: See next chapter.

3 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. See *Hobart v. Littlefield*, 13 R. I. 341, 346.

4 See citations in next note.

5 *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; quoted, *Forchelmer v. Stewart*, 65 Iowa, 594, 596; 54 Am. Rep. 30, 32. And see *Wigton v. Bowley*, 130 Mass. 252, 254; *Dows v. Nat. Exchange Bank*, 91 U. S. 618, 634. Consult generally, Bennett's Benjamin on Sales, § 332, n. a, quoting foregoing statements, and citing following cases: *Allen v. Williams*, 12 Pick. 237; *Stanton v. Eager*, 16 Pick. 473; *Coggill v. Hartford etc. R. R. Co.* 3 Gray, 545; *Langdell's Cases on Sales*, 713; *Stevens v. Boston etc. R. R. Co.* 8 Gray, 262; *Hobart v. Littlefield*, 13 R. I. 341, 343; *Farmers' & Mechanics' Bank v. Logan*, 74 N. Y. 538; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 390; *Sprague v. King*, 1 Pugs & B. 241; *New Brunswick Ry. Co. v. McLeod*, 1 Pugs & B. 257.

6 See *First Nat. Bank v. Crocker*, 111 Mass. 163, 167; *Reynolds v. Scott*, 4 Pac. Rep. (Cal.) 346; 18 The Reporter, 452; *Dows v. Nat. Exchange Bank*, 91 U. S. 618, 631. And compare *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 365.

§ 144. *Passing of title to buyer.* — *Ship owned or hired by buyer.* The fact that the ship on which the goods are delivered belongs to the vendee, or is hired by him, does not necessarily cause the property to pass where the bill of lading is made out to the vendor's order.<sup>1</sup>

*Bill of lading indorsed as security for draft.* So where goods are sent by a bill of lading indorsed to a third person as security for a draft, the property does not pass at law until the draft has been accepted or paid, or there has been a waiver of acceptance or payment.<sup>2</sup> And until one of these things is done, the goods cannot be attached as the property of the buyer; so that if he should obtain possession of them, he cannot give a good title even to a *bona fide* purchaser.<sup>3</sup>

*Procurement of blank bill of lading.* But the title passes where the procurement from the captain of the buyer's ship of bills of lading with a blank for the name of the consignee, afterwards filled out with the name of the seller, is effected by an assurance that the matter was of no consequence.<sup>4</sup>

*Unindorsed bill of lading in seller's name.* So where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unindorsed, will not prevent the property from passing.<sup>5</sup>

*Bill of lading specially indorsed to buyer, etc.* And where goods were to be delivered "free on board a vessel, and the bill of lading was made out to shipper's order," but on the same day was specially indorsed to the buyers, and sent to the broker who negotiated the sale, it was held that the intention was not to prevent



the passing of the property, and hence that the title and risk were in the buyer.<sup>6</sup>

*Seller's right of possession and lien.* Yet even where it was considered that the title and even the risk did pass, it has been suggested that the seller might retain the possession and a lien for the price.<sup>7</sup>

1 See *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Langdell's Cases on Sales*, 952. And consult *Falke v. Fletcher*, 18 Com. B. N. S. 403; 34 Law J. Com. P. 146; *Langdell's Cases on Sales*, 990; *Dows v. Nat. Exchange Bank*, 91 U. S. 618, 631.

2 *Forty Sacks of Wool*, 14 Fed. Rep. 643, 645. And see *Dows v. Nat. Exchange Bank*, 91 U. S. 618; *Newcomb v. Boston etc. R. R. Corp.* 115 Mass. 230, 233; *Jenkyns v. Brown*, 14 Q. B. 496; *Langdell's Cases on Sales*, 948; *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; *Langdell's Cases on Sales*, 996.

3 *Forty Sacks of Wool*, 14 Fed. Rep. 643, 645.

4 *Ogle v. Atkinson*, 5 Taunt. 759; *Langdell's Cases on Sales*, 922. Or where a railroad receipt and way-bill making goods deliverable to the seller's order were taken after the delivery was complete enough to vest title in the buyer: *Phila. etc. R. R. Co. v. Wireman*, 88 Pa. St. 264.

5 *Joyce v. Swan*, 17 Com. B. N. S. 84, 101. And see *Ogg v. Shuter*, Law R. 10 Com. P. 159, 162; *City Bank v. Rome etc. R. R. Co.* 44 N. Y. 136.

6 *Browne v. Hare*, 3 Hurl. & N. 484; 4 Hurl. & N. 822; *Langdell's Cases on Sales*, 976. And see *Van Casteel v. Booker*, 2 Ex. 691; *Hobart v. Littlefield*, 13 R. I. 34.

7 See *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; *Langdell's Cases on Sales*, 996, 1003; *Hobart v. Littlefield*, 13 R. I. 341, 346.

§ 145. *Rights of seller's transferee. — Delivery of bill of lading to purchaser or pledgee.* A consignor who has reserved the *jus disponendi*, may effectuate a sale or pledge of the property consigned, by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact delivered.<sup>1</sup> If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill<sup>2</sup> takes it subject to any right or lien which the consignee may have acquired by reason of his possession.<sup>3</sup>

*Transfer before consignee's possession of goods.* But if the bill of lading be transferred by way of sale or

pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery<sup>4</sup> of the property to him.<sup>5</sup>

*Buyer's objections to the sale, etc.* Where the buyer, when the bill of lading made out to the seller's order was presented to him unindorsed, made various objections to the sale, but finally offered the price, and said that he accepted the cargo, whereupon the seller refused to take his money and indorse the bill of lading over to him, but took the bill from the counter and procured an advance thereon from another customer, it was held that there was no such appropriation as would pass the property.<sup>6</sup>

1 *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366.

2 Bill of lading in general: See under chapter on DOCUMENTS OF TITLE.

3 *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366.

4 See under chapter on DELIVERY.

5 *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366. But the principle on which the title to goods may be transferred by a transfer of the bill of lading is wholly distinct from that on which the right of stoppage *in transitu* rests: *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366. For the right to stop goods in transit, exists only where the vendor has consigned them to the buyer under circumstances which vest the title in the latter, while the transfer of goods by delivering the bill of lading can be made only in cases where the vendor has not parted with the title: *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366. Stoppage *in transitu* in general: See subsequent chapter of book.

6 *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942. And that the second customer could, as owner of the cargo, sue in trover the original purchaser who had taken part of the cargo after the arrival of the vessel in port: *Wait v. Baker*, 2 Ex. 1.

‡ 146. *Effect of delivery to carrier.—As passing title.* Where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property,<sup>1</sup> as he is the agent of the vendee to receive it, and the delivery to him is equivalent to a delivery to the vendee.<sup>2</sup>

*Immaterial circumstances.* To produce this effect it is not necessary that any particular carrier should be designated by the buyer,<sup>3</sup> nor does it make any difference<sup>4</sup> which party is to pay the freight for the goods.<sup>5</sup>

*Where bill of lading taken.* But where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer,<sup>6</sup> but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried.<sup>7</sup>

1 See citations in next note.

2 *Shepherd v. Harrison*, Law R. 5 H. L. 116; (S. C. below, Law R. 4 Q. B. 197, 493); *Langdell's Cases on Sales*, 996, 1015; quoting and approving, *Benjamin on Sales* (Eng. ed.) bk. ii. ch. 6, p. 288, as relying upon *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942, 945. See 1 *Corbin's Benjamin on Sales*, §§ 565, 573, 576; *Bennett's Benjamin on Sales*, § 399, n. a., referring also to following English cases: *Dawes v. Peck*, 8 Term Rep. 330; *Dutton v. Solomonson*, 3 Bos. & P. 582; *London etc. Ry. Co. v. Bartlett*, 7 Hurl. & N. 500, and 31 Law J. Ex. 92; *Dunlop v. Lambert*, 6 Clark & F. 600; *Cork Distilleries Co. v. Great So. Ry. Co.* Law R. 7 H. L. 269. And to following American cases: *Stanton v. Eager*, 16 Pick. 467; *Putnam v. Tillotson*, 13 Met. 517; *Orcutt v. Nelson*, 1 Gray, 536; *Merchant v. Chapman*, 4 Allen, 362; *Hunter v. Wright*, 12 Allen, 548; *Johnson v. Stoddard*, 100 Mass. 306; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 166; *Woolsey v. Bailey*, 27 N. H. 217; *Garland v. Lane*, 46 N. H. 245; *Arnold v. Prout*, 51 N. H. 587, 589; *Hobart v. Littlefield*, 13 R. I. 341; *Ludlow v. Bowne*, 1 Johns. 15; *Waldron v. Romaine*, 22 N. Y. 368; *Rodgers v. Phillips*, 40 N. Y. 519; *Summeril v. Elder*, 1 Binn. 106; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Magruder v. Gage*, 33 Md. 344; *Goodwyn v. Douglas*, Cheves L. & Eq. 174.

3 See *Garland v. Lane*, 46 N. H. 245, 248; *Arnold v. Prout*, 51 N. H. 587, 589; *Watkins v. Payne*, 57 Ga. 50.

4 According to *Bennett's Benjamin on Sales*, § 399, n. e, whence paragraph derived. A delivery of an article sold to a person appointed by the vendee to receive it is a delivery to the vendee: *Wing v. Clark*, 24 Me. 366, 373; *Hunter v. Wright*, 12 Allen, 548. And so is a delivery at the place agreed, if nothing remains to be done by the vendor: *Nichols v. Morse*, 100 Mass. 523.

5 See *Dutton v. Solomonson*, 3 Bos. & P. 584; *Vale v. Boyle*, 1 Cowp. 294; *Ranny v. Higby*, 5 Wis. 62.

6 See citations in next note.

7 *Shepherd v. Harrison*, Law R. 5 H. L. 116; (S. C. below, Law R. 4 Q. B. 197, 493); *Langdell's Cases on Sales*, 996, 1015; quoting and approving, *Benjamin on Sales* (Eng. ed.) bk. ii. ch. 6, p. 288, as relying upon *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942, 945, and *Moakes v. Nicolson*, 19 Com. B. N. S. 290; Law J. 54 Com. P. 273; *Langdell's Cases on Sales*, 992, 995. And see *Reynolds v. Scott*, 4 Pac. Rep. (Cal.) 346, 347. To same effect, according to *Bennett's Benjamin on Sales*, § 399, are *Gabarron v. Kreeft*, Law R. 10 Ex. 274, 281, 285, and *Mirabita v. Imperial Ottoman Bank*, Law

R. 3 Ex. D. 164, 172; 31 Eng. Rep. 201, 208. Consult, also, 1 Corbin's Benjamin on Sales, § 566; Campbell on Sales, 266. Doctrine stated as rule of presumption: 2 Schouler on Personal Property, § 273, which also cites, Key v. Cotesworth, 7 Ex. 595; Langdell's Cases on Sales, 963; Brandt v. Bowlby, 2 Barn. & Adol. 932; Langdell's Cases on Sales, 925; Wilmshurst v. Bowker, 2 Man. & G. 792; 7 Man. & G. 882; Langdell's Cases on Sales, 930; Ellershaw v. Magniac, 6 Ex. 570; Langdell's Cases on Sales, 835; Wait v. Baker, 2 Ex. 1; Langdell's Cases on Sales, 942; Blanchard v. Page, 8 Gray, 281; Merchants' Nat. Bank v. Bangs, 102 Mass. 295; Griffith v. Ingledew, 6 Serg. & R. 429; Marine Bank v. Wright, 48 N. Y. 1; Ward v. Taylor, 56 Ill. 494; Halliday v. Hamilton, 11 Wall. 560.

§ 147. **Bill of lading to seller's order.**—*As indication of intention to reserve control.* The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention<sup>1</sup> to reserve the *jus disponendi*,<sup>2</sup> and to prevent the property from passing to the vendee.<sup>3</sup> And where an unpaid vendor, shipping goods under a contract of sale, takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the seller's lien only,<sup>4</sup> in case of the purchaser's making default in the payment of the price,<sup>5</sup> but reserves a right of disposing of the goods, so long, at least, as the purchaser continues in default.<sup>6</sup>

*Proof in rebuttal.* But the *prima facie* conclusion that the vendor reserves the *jus disponendi* may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property;<sup>7</sup> and it is for the jury to determine, as a question of fact,<sup>8</sup> what the real intention was.<sup>9</sup>

*Illustrative cases.* And where the bill of lading was taken to shipper's order, and sent to a member of the selling firm, as according to the tenor of a letter received from the buyer, it was feared that he would not accept the goods at the price named, a verdict of the jury was sustained which found in favor of the passing of

the property, under a charge that would require a different result if the sellers intended to keep the goods in their own hands and under their own control till a final arrangement took place as to the terms of the bargain.<sup>10</sup> But it has been held that the property did not pass to the buyer, even though the goods were delivered on board a vessel chartered by him, if, as the jury found, it was the seller's intention to retain the property until his agent in the city, which was the destination of the goods, should receive the cash against the bill of lading, as indicated by the seller's retention of one of the bills of lading, which was alone stamped, and which he sent to his agent, while sending another to the buyer, with invoice and letter of advice.<sup>11</sup>

*Statement of governing doctrine.* The doctrine governing in this regard has been laid down in this country to be that where a bill of lading has been taken, containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended that the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive;<sup>12</sup> and where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, or in other words, where there is anything to rebut the effect of the bill, it becomes a question for the jury whether the property has passed.<sup>13</sup>

1 Determination of intention: See *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. See section on EVIDENCE OF INTENTION.

2 See citations in next note. Restrictive receipt for the purpose of giving the shipper command of the goods: *Craven v. Ryder*, 6 Taunt. 433. And see *Ruck v. Hatfield*, 5 Barn. & Ald. 632.

3 See *First Nat. Bank v. Crocker*, 111 Mass. 163, 167; *Dows v. Nat. Exchange Bank*, 91 U. S. 618, 631; *Reynolds v. Scott*, 4 Pac. Rep.

(Cal.) 346, 347; quoting, Bennett's Benjamin on Sales, § 399, which cites following cases: *Wilmshurst v. Bowker*, 2 Man. & G. 792; 7 Man. & G. 882; *Langdell's Cases on Sales*, 930; *Ellershaw v. Magniac*, 6 Ex. 570; *Langdell's Cases on Sales*, 855; *Wait v. Baker*, 2 Ex. 1; *Langdell's Cases on Sales*, 942; *Jenkyns v. Brown*, 14 Q. B. 496; 19 Law J. Q. B. 233; *Langdell's Cases on Sales*, 948; *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; 5 Eng. App. 116; *Langdell's Cases on Sales*, 996; *Gabarron v. Kreeft*, Law R. 10 Ex. 474; *Ogg v. Shuter*, Law R. 1 C. P. D. 47; *Ex parte Banner*, Law R. 2 Ch. D. 78, and *Mason v. Great West. Ry. Co.* 31 Up. Can. Q. B. 73. Consult 1 Corbin's Benjamin on Sales, § 567. And compare *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 365.

4 Seller's lien: See subsequent chapter of book.

5 Payment: See subsequent chapter of book.

6 *Ogg v. Shuter*, Law R. 1 C. P. D. 47; reversing same case, Law R. 10 Com. P. 159; as stated, Bennett's Benjamin on Sales, § 399; also more fully stated, Bennett's Benjamin on Sales, § 398 a; 1 Corbin's Benjamin on Sales, § 562. And see *Campbell on Sales*, 265.

7 See citations in succeeding notes. And consult, 2 Schouler on Personal Property, § 273, p. 260; 1 Corbin's Benjamin on Sales, 579.

8 See *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295.

9 Bennett's Benjamin on Sales, § 399, n. i; 1 Corbin's Benjamin on Sales, § 568; citing, *Van Casteel v. Booker*, 2 Ex. 691; *Browne v. Hare*, 4 Hurl. & N. 822; 29 Law J. Ex. 6; *Langdell's Cases on Sales*, 976; *Joyce v. Swan*, 17 Com. B. N. S. 84; *Moakes v. Nicholson*, 19 Com. B. N. S. 290; 34 Law J. Com. P. 273; *Langdell's Cases on Sales*, 992.

10 *Joyce v. Swan*, 17 Com. B. N. S. 84.

11 *Moakes v. Nicholson*, 19 Com. B. N. S. 290; 34 Law J. Com. P. 273; *Langdell's Cases on Sales*, 992, 995.

12 *Dows v. Nat. Exchange Bank*, 91 U. S. 633.

13 *Dows v. Nat. Exchange Bank*, 91 U. S. 633; quoted, Bennett's Benjamin on Sales, § 399, n. l, p. 431.

§ 148. **Delivery on board buyer's vessel.**—*Restraining effect of.* Although as a general rule the delivery of goods by the vendor on board the purchaser's own vessel is a delivery to the purchaser, and passes the property,<sup>1</sup> yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*,<sup>2</sup> even in cases where the bills of lading show that the goods are free of freight<sup>3</sup> because owner's property.<sup>4</sup>

*Goods not appropriated before shipment.* And on a sale of goods not specific, although the goods have been delivered on board a ship of the purchaser, or one chartered for him, yet in the absence of any appropria-

tion of the goods in fulfillment of the contract previous to shipment, the fact that the vendor has taken a bill of lading, making the goods deliverable to his own order, or that of a third person, will prevent the property in them from passing to the purchaser.<sup>5</sup>

1 See *Mirabita v. The Imperial Ottoman Bank*, Law R. 3 Ex. D. 164, 172; 30 Eng. Rep. 201, 208. See section on RESERVATION OF CONTROL IN GENERAL. Transfer of title generally: See next chapter.

2 Retention of *jus disponendi*: See *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295.

3 See *Van Casteel v. Booker*, 2 Ex. 691; *Turner v. Liverpool Dock Trustees*, 16 Ex. 513; *Langdell's Cases on Sales*, 952.

4 *Bennett's Benjamin on Sales*, § 399, n. k; 1 *Corbin's Benjamin on Sales*, § 569, n. g; citing, *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; *Langdell's Cases on Sales*, 952; *Ellershaw v. Magniac*, 6 Ex. 570; *Langdell's Cases on Sales*, 835; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Langdell's Cases on Sales*, 925; *Van Casteel v. Booker*, 2 Ex. 691; *Moakes v. Nicholson*, 19 Com. B. N. S. 230; Law J. 34 Com. P. 146; *Langdell's Cases on Sales*, 990, 995; *Schotsman v. Lancashire etc. Ry. Co.* Law R. 2 Ch. 332; *Gumm v. Tyrie*, Law J. 33 Q. B. 97; Law J. 34 Q. B. 124. Compare *Campbell on Sales*, 266; 2 *Schouler on Personal Property*, § 273, p. 260.

5 *Gabarron v. Kreeft*, Law R. 10 Ex. 274.

§ 149. **Disposition of bill of exchange.**—*Refusing acceptance.* Where a bill of exchange for the price of goods is enclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading, unless he accepts the bill of exchange,<sup>1</sup> and if he refuse acceptance he acquires no right to the bill of lading, or the goods of which it is the symbol,<sup>2</sup> while the vendor may exercise his *jus disponendi* by selling or otherwise disposing of the goods, so long, at least, as the buyer remains in default.<sup>3</sup>

*Mailing to purchaser of bill of lading to buyer's order.* But although the vendor may intend the transfer of the property to be conditional upon the buyer's acceptance of the bill of exchange, yet if he puts into the post, addressed to the buyer, a bill of lading making the goods deliverable to the buyer's order, he thereby abandons all control over the goods,<sup>4</sup> and the property thereupon vests unconditionally in the buyer, and does

not revert in the vendor on the buyer's failure or refusal to accept the bill of exchange.<sup>5</sup>

*Depositing bill of lading with discounting bankers.* And when the vendor deals with the bill of lading only to secure the contract price, as by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price.<sup>6</sup>

*General and special property.* The shipper of goods may, however, convey a special property in a cargo by indorsing the bill of lading, deliverable to his own order, to the banker who buys the bills of exchange, while the general property may pass to the buyers of the cargo by sending them invoices and letters of advice, showing that the cargo was bought and shipped on their account.<sup>7</sup>

1 See citations in next note.

2 See *Shepherd v. Harrison*, 4 Q. B. 196, 493; *Law R.* 5 H. L. 116; *Langdell's Cases on Sales*, 996; *Ogg v. Shuter*, *Law R.* 1 C. P. D. 47; reversing same case, *Law R.* 10 Com. P. 159; *Bennett's Benjamin on Sales*, § 399, whence paragraph derived, and *n. l.* citing these English and following American cases: *Clark v. Bank of Montreal*, 13 Grant (Ont.) 211; *First Nat. Bank v. Dearborn*, 115 Mass. 222; *Fifth National Bank v. Bayley*, 115 Mass. 228, 230; *Alderman v. Eastern R. R. Co.* 115 Mass. 233; *Bank of Rochester v. Jones*, 4 Comst. 497, 502; *Winter v. Coit*, 3 Seld. 288; *Marine Bank v. Wright*, 48 N. Y. 1; *Millar v. Sav. Assoc.* 3 Week. N. Cas. 490; *Taylor v. Turner*, 87 Ill. 296; *Cobb v. Ill. Cent. R. R. Co.* 88 Ill. 394. Consult, also, 2 *Schouler on Personal Property*, § 274.

3 See *Ogg v. Shuter*, *Law R.* 1 C. P. D. 47; reversing same case, *Law R.* 10 Com. P. 159. See *Campbell on Sales*, 265.

4 See citations in next note.

5 See *Ex parte Banner*, *Law R.* 2 Ch. D. 78; as cited, *Bennett's Benjamin on Sales*, 399, *n. n.*; 1 *Corbin's Benjamin on Sales*, § 571, *n. e.*; distinguishing, *Shepherd v. Harrison*, *Law R.* 4 Q. B. 196, 493; *Law R.* 5 H. L. 116; *Langdell's Cases on Sales*, 996.

6 *Mirabita v. The Imperial Ottoman Bank*, *Law R.* 3 Ex. D. 64; 31 Eng. Rep. 201; determining a point left undecided in *Ogg v. Shuter*, *Law R.* 1 C. P. D. 47, 51. See *Bennett's Benjamin on Sales*, § 399, *n. o.*; and 1 *Corbin's Benjamin on Sales*, § 572, so stating this case. And consult *Campbell on Sales*, 265.

7 *Jenkyns v. Brown*, 14 Q. B. 496; *Langdell's Cases on Sales*, 948, 951.

§ 150. *Transmission to buyer of indorsed bill of lading.*  
— *Question of seller's intention.* If the shipper of goods



from abroad takes the bill of lading to his own order, or to blank order, which is practically the same thing, and immediately indorses it and sends it to the consignee, it is presumed, if consistent with the contract and other circumstances, that he intended the same thing as if he had taken the bill of lading in the name of the consignee at once.<sup>1</sup> In such cases it has been left to the jury to finally decide, as a question of fact, what was the intention of the vendor under all the circumstances of the case.<sup>2</sup>

*Goods deliverable to consignor's order.* And this course has been sustained where the bill of lading made the goods "to be delivered to the order of the consignor," and he indorsed it to the order of the consignee and sent it to his agent for the consignee, as this mode of taking the bill of lading did not necessarily prevent the property from passing.<sup>3</sup> The question was regarded as one of fact, and the jury was considered to have disposed of it and to have determined that it was the intention of the consignor to ship the goods in performance of his contract to place them "free on board," and not to have had the bill of lading taken in this form for the purpose of retaining a control over the goods and continuing to be owner, contrary to the contract.<sup>4</sup>

*Remittance of draft requested.* Nor does the fact that the bill of lading, deliverable to shipper's order and indorsed in blank, is sent to the buyer in a letter requesting a remittance of a draft for the price, necessarily render such remittance a condition precedent to the vesting of the property in the buyer, against whom the right of stoppage *in transitu* is sought to be asserted.<sup>5</sup>

*Undelivered bill of lading in buyer's name.* But the fact that the bill of lading is taken in the buyer's name, if it is not delivered, creates no presumption of an intention to transfer the property unconditionally.<sup>6</sup>

1 Campbell on Sales, 266 ; citing, *Walley v. Montgomery*, 3 East, 535 ; *Langdell's Cases on Sales*, 911 ; *Van Casteel v. Booker*, 2 Ex. 691 ; *Browne v. Hare*, 4 Hurl. & N. 822 ; 29 Law J. Ex. 6 ; *Langdell's Cases on Sales*, 976.

2 See *Van Casteel v. Booker*, 2 Ex. 691 ; *Browne v. Hare*, 4 Hurl. & N. 822 ; 29 Law J. Ex. 6 ; *Langdell's Cases on Sales*, 976 ; *Bennett's Benjamin on Sales*, § 395 ; 1 *Corbin's Benjamin on Sales*, § 556.

3 *Browne v. Hare*, 3 Hurl. & N. 484 ; 4 Hurl. & N. 822 ; *Langdell's Cases on Sales*, 976, 989.

4 *Browne v. Hare*, 3 Hurl. & N. 484 ; 4 Hurl. & N. 822 ; *Langdell's Cases on Sales*, 976, 989. As in the case of *Wait v. Baker*, 2 Ex. 1 ; *Langdell's Cases on Sales*, 942. And as is explained in *Turner v. Liverpool Dock Trustees*, 6 Ex. 543 ; *Langdell's Cases on Sales*, 952. And in *Van Casteel v. Booker*, 2 Ex. 691.

5 *Wilmshurst v. Bowker*, 2 Man. & G. 792 ; 7 Man. & G. 882 ; *Langdell's Cases on Sales*, 930, 941.

6 *Sheridan v. New Quay Co.* 4 Com. B. N. S. 618 ; as noted, *Campbell on Sales*, 267.

§ 151. **Transmission to secure advances.**—*As evidence of appropriation, etc.* It has been laid down that when bills of lading to shipper's order, or to — order, indorsed, or by which goods are made deliverable to a consignee by name, are transmitted to him as security for antecedent advances, they are evidence of such a destination and appropriation to him of the specific goods as will vest in him a property, absolute or special in them, at the time of their delivery on board ;<sup>1</sup> and this statement seems to be supported<sup>2</sup> by the American cases.<sup>3</sup>

*General indebtedness of consignor.* But there is a recognized distinction if the consignor be simply generally indebted to the consignee.<sup>4</sup>

1 Abb. Shipp. (5th Am. ed.) p. 410.

2 According to *Bennett's Benjamin on Sales*, § 399, n. 1.

3 See *Grosvenor v. Phillips*, 2 Hill, 147 ; *Bailey v. Hudson R. R. Co.* 49 N. Y. 70 ; *Schumacher v. Eby*, 24 Pa. St. 521 ; *Straus v. Wessel*, 30 Ohio St. 211 ; *Nelson v. Chicago etc. R. R. Co.* 2 Ill. App. 180.

4 See *Elliot v. Bradley*, 23 Vt. 217 ; *Grosvenor v. Phillips*, 2 Hill, 147 ; *Bank of Rochester v. Jones*, 4 N. Y. 497 ; *Redd v. Bunus*, 58 Ga. 574 ; *Nelson v. Chicago etc. R. R. Co.* 2 Ill. App. 180 ; *Hodges v. Kimball*, 49 Iowa, 579 ; *Saunders v. Bartlett*, 12 Heisk. 316 ; *Oliver v. Moore*, 12 Heisk. 482 ; *Bennett's Benjamin on Sales*, § 399, n. 1, so citing these cases ; quoting, *Frechette v. Corbet*, 5 Low. Can. 211, and referring to *Marine Bank of Chicago v. Wright*, 48 N. Y. 1.

§ 152. **Seller's transmission to agent of bill of lading, etc.**—*Presumption of condition of acceptance of bill of ex-*

*change.* If the shipper from abroad takes the bill of lading to shipper's order, and sends it indorsed to his own distant agent, and the latter sends it to the buyer in the same country in a letter enclosing a bill of exchange, and requesting that the same be returned accepted, the presumption, founded on mercantile usage, is that the acceptance of the bill of exchange is a condition precedent to the vesting in the buyer of the right of property and possession under the bill of lading.<sup>1</sup>

*Effect of different course.* For it has been declared to be perfectly well settled that if a consignor in such a case wishes to prevent the property in the goods, and the right to deal with the goods while at sea, from passing to the consignee, he must by the bill of lading make the goods deliverable to his own order, and forward the bill of lading to an agent of his own.<sup>2</sup> And if he does not do that, though he still retains the right of stopping the goods *in transitu*,<sup>3</sup> yet subject to that right the property in the goods and the right to the possession of the goods is in the consignee.<sup>4</sup>

*When title passes.* But the property passes if the bill of lading is taken deliverable to the buyer or his agent, and sent directly to either of them, in a letter advising of the drawing of drafts on the buyer,<sup>5</sup> or even, as it has been held, if the bill of lading, deliverable to the seller's order, is sent unindorsed to the buyers, and another bill of lading of the same set is sent by the sellers to a third party indorsed, for the purpose of securing the amount of their bill upon the buyers:<sup>6</sup> though it is otherwise if the letter enclosing an unindorsed bill of lading to the buyer refers to an indorsed bill sent by the seller to his agent.<sup>7</sup>

1 Campbell on Sales, 267. See *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; Langdell's Cases on Sales, 996. And compare *Ogg v. Shuter*, Law R. 1 C. P. D. 47.

2 Ex parte Banner, Law R. 2 Ch. D. 278, 288; distinguishing, *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; Langdell's Cases on Sales, 996. And see *Key v. Cotesworth*, 7 Ex. 595; Langdell's Cases on Sales, 963, 969.

3 Stoppage *in transitu*: See subsequent chapter on subject.

4 Ex parte Banner, Law R. 2 Ch. D. 278, 288.

5 See *Key v. Cotesworth*, 7 Ex. 595; Langdell's Cases on Sales, 963; Ex parte Banner, Law R. 2 Ch. D. 278.

6 *Coxe v. Harden*, 4 East, 211; Langdell's Cases on Sales, 916.

7 *Brandt v. Bowlby*, 2 Barn. & Adol. 925; Langdell's Cases on Sales, 925.



## CHAPTER XIII.

## TRANSFER OF TITLE.

- § 153. In general
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- § 167. When delivery not such prerequisite.
- § 168. Estoppel of seller.
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§ 153. *In general.*—*Importance of determining.* The transfer of the property in the thing sold is the primary object of a sale, and it is often necessary to inquire whether the property has been actually transferred, or is only intended to be transferred at some future period.<sup>1</sup>

*Cash sale at store counter.* In considering the point in a transaction amounting to a contract of sale, at which a transfer of title takes place from seller to buyer, with a change of the rights and responsibilities of ownership, no difficulty is met in the simple case of a cash sale made at a store counter, where the customer enters, selects his goods, and carries them away.<sup>2</sup>

*Circumstances complicating point of transition.* But the determination of the point of transition becomes more complicated under the various circumstances

which may attend a sale, for there may be a sale on credit, the customer receiving his goods under an understanding to defer payment,<sup>3</sup> or the customer may have paid on the spot, with the understanding that the goods should be sent to his address; or a bargain may have been struck and nothing said concerning payment of price and delivery.<sup>4</sup>

*Uncertainty concerning thing sold.* So the terms of the purchase may have contemplated some further act on the part of buyer or seller, or a third person, such as weighing, counting, or measuring the goods;<sup>5</sup> or, to make the question still more intricate, a contract might relate to goods which have as yet no existence, but must be manufactured to order;<sup>6</sup> or which, being already in being as part of a lump or mass, must be separated and set apart<sup>7</sup> before there can be identical and specific property for the sale to operate upon.<sup>8</sup>

1 Campbell on Sales, 225. This inquiry becomes important in questions arising out of the accidental destruction of the subject-matter of the sale, and in questions arising out of the insolvency of one of the parties, and was formerly of consequence in regard to the form of pleading: Campbell on Sales, 225. And see Graham's Blackburn on Sales, Introd. VII.

2 See 2 Schouler on Personal Property, § 235. In such a case the buyer, as owner of the goods, becomes liable for their loss in any manner as soon as he has set foot in the street, and has then the right to resell them at discretion: 2 Schouler on Personal Property, § 235.

3 See Anstedt v. Sutter, 30 Ill. 164, 166.

4 2 Schouler on Personal Property, § 235.

5 See chapter on SALES OF SPECIFIED CHATTELS.

6 See Cunningham v. Ashbrook, 20 Mo. 553, 557; also see chapter on SALES OF MANUFACTURED CHATTELS.

7 See Cunningham v. Ashbrook, 20 Mo. 553, 557; also see chapter on SALES OF UNSPECIFIED CHATTELS.

8 2 Schouler on Personal Property, § 235. See chapter on EXECUTORY SALES.

§ 154. **Contract or conveyance.**—*Bargain and sale, or executory agreement.* In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is con-

cluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor;<sup>1</sup> but in an executory agreement the goods remain the property of the vendor till the contract is executed.<sup>2</sup> And the distinction between the two transactions in this respect has been developed by considering the latter as a contract, and the former as also a conveyance.<sup>3</sup>

*Privilege of repurchase.* Where the party purchasing expressly declared that he would not take a mortgage, but must have a sale of the property to himself, and a bill of sale was written and signed, and the property was delivered to the vendee, and taken possession of by him, and no acts of ownership afterwards exercised by the vendor over it, but the latter had the privilege conceded to him that if he would pay at a certain time a certain price for the property he might purchase it, it has been held that that was the full extent of his rights,<sup>4</sup> and that the title vested in the purchaser.<sup>5</sup>

1 See § 158, ON TRANSFER OF TITLE WITHOUT PAYMENT OR DELIVERY.

2 Bennett's Benjamin on Sales, § 308, n. b, citing following cases: *Olney v. Howe*, 89 Ill. 556; *Straus v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588, 592; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165; *Cardinell v. Bonnett*, 52 Cal. 476; *The Elgee Cotton Cases*, 22 Wall. 180.

3 See Campbell on Sales, 2; Graham's Blackburn on Sales, 243.

4 *Cook v. Lion Fire Ins. Co.* 7 Pac. Rep. 784; Sup. Ct. Cal. August 26, 1885.

5 *Cook v. Lion Fire Ins. Co.* 7 Pac. Rep. 784. See Jones on Mortgages, § 326; *Hoopes v. Bailey*, 28 Miss. 328.

§ 155. *Intention to pass title.—Express or presumed intention.* The inquiry as to the point of time when the property is transferred depends on the intention, expressed or presumed, of the parties to the sale.<sup>1</sup> And it has been suggested that there is a certain bias against the presumed intention of complete transfer, traceable in various reported decisions,<sup>2</sup> wherever the natural

result of litigation would be to give the buyer the benefit of goods for which he can never pay.<sup>3</sup>

*Distinct manifestation of intention.* But there can be no question when the intention is clearly and unequivocally manifested,<sup>4</sup> as where a seller expressly reserves title until the whole price shall be paid.<sup>5</sup>

1 Campbell on Sales, 225. The question is rather one of intention than of strict law, the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances: Hatch v. Oil Co. 100 U. S. 124, 131. And see Terry v. Wheeler, 25 N. Y. 520, 525; Langdell's Cases on Sales, 706; Callaghan v. Meyers, 89 Ill. 566, 570; Sewell v. Eaton, 6 Wis. 490.

2 See Simmons v. Swift, 5 Barn. & C. 857; Langdell's Cases on Sales, 659; referring to Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639; Haldeman v. Duncan, 51 Pa. St. 66.

3 2 Schouler on Personal Property, § 236. Or leave the seller to enjoy the purchase money advanced for goods which he has never delivered: 2 Schouler on Personal Property, § 236.

4 1 Corbin's Benjamin on Sales, § 309, n. 2.

5 Weed v. Boston etc. Ice Co. 12 Allen, 377.

§ 156. *Intention governs.—In general.* Whether the title to the property, upon an agreement for a sale thereof, passes or not, depends<sup>1</sup> upon the intention of the parties to the agreement;<sup>2</sup> nor does the rule in regard to something remaining to be done<sup>3</sup> apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once,<sup>4</sup> as their intention must be looked at in every case.<sup>5</sup>

*Province of court and jury.* And this intent is to be determined by the jury,<sup>6</sup> unless it is plain as matter of law that the evidence will justify a finding but one way.<sup>7</sup> Thus, where the owner of wheat stacked upon his premises at three different places made a contract with one who saw the wheat at two of such places, whereby the former, at some subsequent time, was to thresh the wheat, and retain from seventy-five to one hundred bushels thereof, and transport the remainder to a town where it was to be weighed, and then to an-



other town, where it was to be delivered and paid for at a specified rate per bushel, a portion of the purchase money being paid at the time the original contract was made, it was held that it cannot be said, as a matter of law, that the title to the wheat, or to any portion thereof, was immediately transferred from the one party to the other, but the question was for the jury.<sup>8</sup>

*Ascertainment and manifestation.* But this intention as to the time when the title is to pass can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter;<sup>9</sup> and it must be manifested at the time the bargain is made;<sup>10</sup> while the point to be ascertained is whether the negotiations and acts of the parties are evincive of an intention on the part of the seller to relinquish all further claim or contract as owner, and on the part of the buyer to assume such control with its consequent liabilities.<sup>11</sup>

1 According to Bennett's Benjamin on Sales, § 311, n. d, source of statements and citations in succeeding paragraphs, except Caywood v. Timmons, 31 Kan. 394.

2 See following cases: *Me.*—Stone v. Peacock, 33 Me. 383; Dyer v. Libby, 61 Me. 45. *Vt.*—Bellows v. Wells, 36 Vt. 559; Fitch v. Burk, 38 Vt. 689. *N. H.*—Fuller v. Bean, 34 N. H. 290; Ockinton v. Rickey, 41 N. H. 279, 280; Kelsea v. Haines, 41 N. H. 346, 353; Prescott v. Locke, 51 N. H. 101, 102, 103. *Mass.*—Sumner v. Hamlet, 12 Pick. 76, 82; Macomber v. Parker, 13 Pick. 182, 183; Morse v. Sherman, 106 Mass. 433; Dugan v. Nichols, 125 Mass. 73. *Conn.*—Chapman v. Shephard, 25 Conn. 413. *N. Y.*—Russell v. Carrington, 42 N. Y. 118; 1 Am. Rep. 498; Hurd v. Cook, 75 N. Y. 451. *Mo.*—Cunningham v. Ashbrook, 20 Mo. 553. *Mich.*—Wilkinson v. Holliday, 33 Mich. 386. *Ind.*—Lester v. East, 49 Ind. 588, and cases cited. *Eng.*—Ogg v. Shuter, Law R. 10 Com. P. 459. *Can.*—Gleason v. Knapp, 26 Up. Can. C. P. 553; Ross v. Eby, 28 Up. Can. C. P. 316. *New Bruns.*—Sprague v. King, 1 Pugs. & B. 299; Gibson v. McKean, 3 Pugs. 299.

3 See section on subject under chapter on EXECUTORY SALES. .

4 See citations in next note.

5 Turley v. Bates, 2 Hurl. & C. 200, 211; Langdell's Cases on Sales, 692; Logan v. Le Mesurier, 11 Moore P. C. C. 116; Langdell's Cases on Sales, 681; Wilkinson v. Holiday, 33 Mich. 386.

6 *Me.*—George *v.* Stubbs, 26 *Me.* 250; Dyer *v.* Libby, 61 *Me.* 45. *N. H.*—Fuller *v.* Bean, 34 *N. H.* 230; Kelsea *v.* Haines, 41 *N. H.* 253. *Mass.*—Riddle *v.* Varnum, 20 *Pick.* 283; Merchants' Nat. Bank *v.* Bangs, 102 *Mass.* 291; Marble *v.* Moore, 102 *Mass.* 443. *N. Y.*—Kidder *v.* McKnight, 13 *Johns.* 234. *Iowa*—McClurg *v.* Kelly, 21 *Iowa*, 508.

7 Merchants' Nat. Bank *v.* Bangs, 102 *Mass.* 291, 296; Wigton *v.* Bowley, 130 *Mass.* 254.

8 Caywood *v.* Timmons, 31 *Kan.* 394. And hence it was erroneous for the court to give instructions upon the theory that the original contract between the parties constituted a fully completed sale of the wheat whereby the property immediately passed to the purchasers, and that the latter took all the risk of loss or damage which might result from rains or storms or other casualties; Caywood *v.* Timmons, 31 *Kan.* 394.

9 See citations in next note.

10 Foster *v.* Ropes, 111 *Mass.* 10; Lingham *v.* Eggleston, 27 *Mich.* 326, 327.

11 Bethel Steam Mill Co. *v.* Brown, 57 *Me.* 18. And see Denny *v.* Williams, 5 *Allen*, 3, 4; Barrett *v.* Goddard, 3 *Mason*, 113.

§ 157. Sufficiency of intention.—*Meeting of minds, etc.* Whether or not, and when the legal title in property sold passes from the vendor to the vendee is<sup>1</sup> always a question of the intention of the parties,<sup>2</sup> which is to be gathered from their acts, and all the facts and circumstances of the case taken together.<sup>3</sup> In order that the title may pass, the owner must intend to part with his property, and the purchaser to become the immediate owner.<sup>4</sup> Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale.<sup>5</sup>

*Performance or waiver of condition.* Hence when there is a condition precedent attached to the contract,<sup>6</sup> the title to the property does not pass to the vendee until performance or waiver of the condition,<sup>7</sup> even though there be an actual delivery of the possession.<sup>8</sup>

1 As stated in preceding section.

2 See *Levasseur v. Cary*, 3 *Atl. Rep.* 461; *Sup. Ct. Me.* March 22, 1886.

3 *State v. Four Jugs of Intoxicating Liquor*, 2 *Atl. Rep.* 586; *Sup. Ct. Vt.* February 5, 1886; *State v. O'Neil*, 22 *The Reporter*, 58; *Sup. Ct. Vt.* March, 1886.

4 *Mason v. Thompson*, 18 *Pick.* 305.

5 *Mason v. Thompson*, 18 Pick. 305, as quoted in cases cited in note before last, which declare that the authorities seem to be uniform on this point, and that the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent.

6 Condition precedent: See under chapter on CONDITIONAL SALES.

7 According to first of cases cited in third note of section.

8 *Benjamin on Sales*, § 320, n. *d.* For Vermont cases to the above points, according to *State v. Four Jues of Intoxicating Liquor*, 2 Atl. Rep. 586, see *Robert's Digest*, 610, et seq.

§ 158. **Without payment or delivery.**—*English statements of the law.* According to the modern English doctrine, neither delivery nor payment of the purchase money is generally requisite for vesting the title to goods in the buyer under a contract of sale;<sup>1</sup> but it is only necessary that the identical goods which are the subject of the contract should be ascertained, and the price fixed.<sup>2</sup> Thus, it is laid down that where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all further risk, if nothing remains to be done to the goods.<sup>3</sup> So it is declared that by the law of England<sup>4</sup> the sale of a specific chattel passes the property to the vendee, without delivery.<sup>5</sup> Similarly it is asserted to be a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property,<sup>6</sup> although the price has not been paid, nor the thing sold delivered to the purchaser.<sup>7</sup>

*American statements of the law.* And in this country it is stated that the sale of a specified article is complete upon the payment of the purchase money, without a delivery, either actual or constructive;<sup>8</sup> and that when a contract for the sale of goods is completed by the assent of both parties the property in the goods is transferred to the vendee, and the price is due to the vendor.<sup>9</sup>

So a familiar form of expression of the law upon the subject is that, when the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer.<sup>10</sup> Under the law of Louisiana also, a contract of sale is perfect, and the property is acquired by the purchaser as soon as there is an existing agreement, even though there has been no delivery.<sup>11</sup>

*Payment as prerequisite to completion of sale.* But the rule is said to be one of presumption only,<sup>12</sup> and according to the ancient English law, payment of the price, where no credit was given, was a prerequisite to the completion of the sale,<sup>13</sup> as is stated to be still the rule in the case of sales for ready money.<sup>14</sup>

*Payment as condition precedent.* And in this country the doctrine seems largely to prevail that where chattels are sold, and no time of payment of the purchase money is fixed by the contract, payment of the price is a condition precedent,<sup>15</sup> and the title would not vest in the vendee until such condition is performed by the buyer, unless it is waived by the seller.<sup>16</sup> In such a case the sale is presumed to be for cash;<sup>17</sup> and according to many of the cases a delivery with the expectation of receiving immediate payment is not absolute, but conditional until payment is made,<sup>18</sup> so that where there is no waiver of payment no title vests in the purchaser till the price is paid.<sup>19</sup>

*Illustrative cases.* Accordingly in an action involving the title to a tombstone alleged to have been sold, it has been held that the court should not have refused to charge the jury that if the contract was for the sale of the property, and no time of credit was agreed upon, then it was a cash sale, and no title would vest in the

buyer until she paid or tendered the money.<sup>20</sup> And where horses were purchased, and a certain sum paid on account, and upon settlement the purchaser tendered a small amount of cash and promissory notes of a third party to the order of the seller for the difference, but the latter refused to accept the notes, alleging that the transaction was for cash, and issued a writ of replevin for the horses, it was held that the purchaser was not entitled to the possession of the horses until he paid for them, and until then the title remained in the seller.<sup>21</sup>

1 *Clarke v. Spence*, 4 Ad. & E. 448; *Langdell's Cases on Sales*, 816, 827, and index note 1025; *Ross's Leading Cases*, 303; *Tarling v. Baxter*, 6 Barn. & C. 359; *Langdell's Cases on Sales*, 621; *Ross's Leading Cases*, 1; *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659, 662; *Ross's Leading Cases*, 157. And see *Olyphant v. Baker*, 5 Denio, 379, 382; *Langdell's Cases on Sales*, 635, 637; *Phillips v. Moor*, 71 Me. 78, 81.

2 *Clarke v. Spence*, 4 Ad. & E. 448; *Ross's Leading Cases*, 303; *Langdell's Cases on Sales*, 816, 827. Or ascertainable: See *Martineau v. Kitching*, Law R. 7 Q. B. 436; 2 Eng. Rep. 559.

3 *Simmons v. Swift*, 5 Barn. & C. 857; *Ross's Leading Cases*, 37; *Langdell's Cases on Sales*, 659, 662. Although he cannot take them away without paying the price: *Simmons v. Swift*, 5 Barn. & C. 857. And see *Jenkins v. Jarrett*, 70 N. C. 255, 256. Statement criticised: *Landreth's Analysis of Sale*, 23.

4 See *Dixon v. Yates*, 5 Barn. & Adol. 313; *Ross's Leading Cases*, 55.

5 *Meyerstein v. Barber*, Law R. 2 Com. P. 23, 51; S. C. Law R. 4 II. L. 317, 326. See 2 *Schouler on Personal Property*, § 243; *Bennett's Benjamin on Sales*, § 303, n. b, and following cases there cited; *Webber v. Davis*, 44 Me. 147; *Bailey v. Smith*, 43 N. H. 143; *Dexter v. Norton*, 55 Barb. 272; *Tome v. Dubois*, 6 Wall. 543, *Crill v. Doyle*, 53 Cal. 713.

6 *Olyphant v. Baker*, 5 Denio, 379; *Langdell's Cases on Sales*, 635, 637. And see *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 709.

7 See *Long on Sales*, 42; *Ross Vendors & P.* 1; 2 *Kent Com.* 492; *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659; *Tarling v. Baxter*, 6 Barn. & C. 360; *Langdell's Cases on Sales*, 621.

8 *Darnell v. Griffin*, 43 Ala. 520, 522. And see *Cassell v. Backrack*, 42 Miss. 53, 67. Compare *Russell v. Carrington*, 42 N. Y. 113, 125; 1 *Am. Rep.* 493.

9 *Barrett v. Goddard*, 3 Mason, 107, 110. And see 2 *Blackst. Com.* 443.

10 2 *Kent Com.* 492; *Phillips v. Moor*, 71 Me. 78, 81. And see 2 *Blackst. Com.* 433; *Inst.* 1, 3, 24; *Wing v. Clark*, 24 Me. 366, 372.

11 *Nicolopulo v. His Creditors*, 37 La. An. 473; *La. Code*, art. 2456.

12 2 Schouler on Personal Property, § 244; citing, Blackburn on Sales, 147, 143.

13 Noy Max. 87, 83; Sheppard's Touchstone, 224; Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639, 645; Ross's Leading Cases, 20. See Benjamin on Sales, §§ 313, 314; 2 Schouler on Personal Property, § 244.

14 See Bussey v. Barnett, 9 Mees. & W. 312; Langdell's Cases on Sales, 711.

15 See citations in next note.

16 Michigan Cent. R. R. Co. v. Phillips, 60 Ill. 190, 193. And see Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311, 319.

17 Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 301, 319. Compare Behren v. O'Donnell, 34 N. J. L. 403.

18 See citations in next note.

19 Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311, 319, and cases cited.

20 Turner v. Moore, 3 Atl. Rep. (Vt.) 467. And that it was error to instruct the jury that if the property was delivered, then the title would vest in the purchaser: Turner v. Moore, 3 Atl. Rep. (Vt.) 467.

21 Bush v. Bender, 4 Atl. Rep. (Pa.) 213.

§ 153. **Right of possession.**—*Completed sale.* When the terms of sale are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery,<sup>1</sup> and the property<sup>2</sup> and the risk of accident<sup>3</sup> to the goods vest in the buyer.<sup>4</sup>

*Seller's right of possession till price paid.* But the sale may be perfect, the title pass, and the property be at the risk of the purchaser, and yet the vendor retain the possession and have complete right to retain the possession until the price is paid, and to compel payment before delivery.<sup>5</sup> Thus it is said that the buyer is entitled to the goods on payment of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment.<sup>6</sup> The payment or tender of the price is in such cases a condition precedent,<sup>7</sup> implied in the contract of sale,<sup>8</sup> and the buyer cannot take the goods, or sue for them, without payment;<sup>9</sup> for though the vendee acquires a right of property by the contract of sale, he does not acquire a

right of possession of the goods<sup>10</sup> until he pays or tenders the price.<sup>11</sup>

*Credit sale.* But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession vests at once<sup>12</sup> in him,<sup>13</sup> but is liable to be defeated if he becomes insolvent<sup>14</sup> before he obtains possession,<sup>15</sup> even though the seller has dispatched the goods to the buyer.<sup>16</sup>

1 2 Kent Com. 492

2 See section on TRANSFER OF TITLE IN GENERAL.

3 See sections on RISK

4 Leonard v. Davis, 1 Black, 476, 483; 2 Kent Com. 492. And see Sweeney v. Owsley, 11 Mon. B. 413; Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48.

5 Bissell v. Balcom, 39 N. Y. 275, 279.

6 See Leonard v. Davis, 1 Black, 476, 483; 2 Kent Com. 492.

7 See Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48.

8 Condition precedent: See under later chapter relating to CONDITIONAL SALES.

9 2 Kent Com. 492.

10 See Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48.

11 2 Kent Com. 492, 493. Possession, a right of possession and a right of property need not co-exist in one and the same person: 2 Schouler on Personal Property, § 243.

12 See Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48.

13 2 Kent Com. 493. And see Leonard v. Davis, 1 Black, 476, 483.

14 Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48; citing, Took v. Hollingsworth, 5 Term Rep. 215.

15 2 Kent Com. 493; citing, Hanson v. Meyer, 6 East, 614; Langdell's Cases on Sales, 639; Ross's Leading Cases, 20; Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 43; Simmons v. Swift, 5 Barn. & C. 857; Ross's Leading Cases, 37; Langdell's Cases on Sales, 659.

16 See title STOPPAGE IN TRANSITU, 2 Bouvier Law Dict. (14th ed.) 543; 2 Kent Com. 493. For the buyer's insolvency, without payment of the price, defeats his right to the possession, as well after the *transitus* has begun, as before the seller has parted with the actual possession of the goods: 2 Kent Com. 493. And see Bloxam v. Sanders, 4 Barn. & C. 941; Ross's Leading Cases, 48.

§ 160. *Change of risk.*—*On transfer of title.* It is said that the common law fixes the risk where the title resides;<sup>1</sup> and so soon as a bargain of sale of specific personal property is struck, the contract becomes absolute,

without actual payment or delivery, and the property and risk of accident to it is in the buyer.<sup>2</sup>

*Without delivery.* The rule that the risk may fall on the buyer though delivery of the goods has not been made to him, has been applied to an action for the price of cattle, where part payment had been made, but the cattle were left in the seller's pasture, to be taken by the buyer within three months, and were swept away by a flood;<sup>2</sup> and to a suit for the price of a mule colt which died before weaning time, being left with the mare until then, under the agreement, where there was a part payment at the time of the sale, and nothing was said as to the payment of the balance;<sup>4</sup> and to an action upon a note for the price of a machine, for which the buyer was to send, where a messenger bringing such note left the machine, contrary to orders, with the seller, and it was soon after destroyed by fire;<sup>5</sup> and to authorize a recovery for the price of wool orally sold by sample, where most of the wool was burnt in the warehouse in which it lay, though several bales were sent to the buyer;<sup>6</sup> and to the acceptance of an offer for cotton stored in a warehouse, which was destroyed by fire before the buyer could obtain the actual possession thereof under an order given to him, where the buyer was to weigh the cotton, and give the seller proper credit on the buyer's books;<sup>7</sup> and to place the loss upon the buyer in a suit for the price of tobacco carried away by a flood while stored in sheds on the buyer's farm, where it had been raised as a tenant by the seller, who was to pay therefor an amount determined by the sum he might realize on its further sale,<sup>8</sup> and to a suit by the buyer to recover back a part payment on the sale of a lot of butter in the seller's store where the buyer took away part, and the residue was destroyed by the Chicago fire;<sup>9</sup> and to a defense that there had been no delivery under an agree-



ment to exchange slaves, where each of them, being a child, was left with its mother, and upon the death of one, detainee was brought for the other.<sup>10</sup>

*Specification of goods not complete.* But though the title and risk may pass without payment or delivery on the sale of specific grain, even though unseparated from a larger mass, yet it is otherwise where no specific quantity or lot is bargained for.<sup>11</sup> And where the property had actually passed to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor and not the purchaser must bear the loss and depreciation in measurement incident to the removal, according to the common course of conveyance.<sup>12</sup>

1 *Joyce v. Adams*, 8 N. Y. 291, 296. And see *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 708. See § 161, on TITLE AND RISK.

2 *Sweeney v. Owsley*, 14 Mon. B. 413. And see 2 Kent Com. 492; *Leonard v. Davis*, 1 Black, 476, 483; also § 153, on RIGHT OF POSSESSION. The goods under a binding contract of sale are at the risk of the vendee till paid for and taken away, and if destroyed by accident in the mean time, the vendor may recover the price: *Wing v. Clark*, 24 Me. 366, 372. And see 2 Blackst. Com. 448.

3 *Bissell v. Balcom*, 39 N. Y. 275, 279. And see *Hayden v. Demets*, 53 N. Y. 426, 431; *Morey v. Medbury*, 10 Hun, 540.

4 *Sweeney v. Owsley*, 14 Mon. B. 413. And see *Henline v. Hall*, 4 Ind. 183.

5 *Wing v. Clark*, 24 Me. 366, 372; followed, *Phillips v. Moor*, 71 Me. 73, 81.

6 *Townsend v. Hargraves*, 118 Mass. 325, 332.

7 *King v. Jarman*, 35 Ark. 190, 197. And see *Thayer v. Lapham*, 13 Allen, 26; *Terry v. Wheeler*, 25 N. Y. 520; *Williams v. Corbey*, 5 Ont. App. 626.

8 *Ruthrauff v. Hagenbuch*, 58 Pa. St. 103. And see *Scott v. Mills*, 6 Serg. & R. 368.

9 *Seckel v. Scott*, 66 Ill. 106. It was held that the title and risk of loss were in the buyer, though the firkins had not been weighed: *Seckel v. Scott*, 66 Ill. 106. Compare *Barrow v. Window*, 71 Ill. 214.

10 *Willis v. Willis*, 6 Dana, 48. See 1 Corbin's Benjamin on Sales, §§ 319, 323, stating foregoing cases.

11 *Levasseur v. Cary*, 3 Atl. Rep. (Me.) 461; S. C. 22 The Reporter, 304; citing, *Phillips v. Moor*, 71 Me. 73; *Waldron v. Chase*, 37 Me. 414.

12 *Cushman v. Holyoke*, 34 Me. 289.

§ 161. *Title and risk.*—*Risk as attending title.* The risk of property, which is the subject of sale, attends the title,<sup>1</sup> and hence the buyers of turpentine have been held bound to suffer the loss of such casks thereof, which were destroyed before delivery, as had been filled up.<sup>2</sup> So where the amount of the purchase money to be paid for unweighed barley had been adjusted by the assent of the buyer, and nothing therefore remained to be done by the seller before delivery was made, it was held that although the seller still had possession and a lien for the purchase money, yet the right of property was in the buyer, and with it the risk of all accidents devolved on him.<sup>3</sup>

*Transfer of title.* And it has been laid down that where there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, as the property remained vested in him at the time of the destruction.<sup>4</sup>

*Assumption of risk.* But in cases where property is to be paid for on delivery, and where the risk of delivery is assumed by the purchaser, the payment is still due if the destruction of the property prevents the delivery;<sup>5</sup> though as the presumption is that the risk and property go together, the intention that the purchaser shall assume the risk before the property has vested in him must be either expressed in the written contract between the parties,<sup>6</sup> or clearly to be inferred from the circumstances of the case.<sup>7</sup>

1 See *Taylor v. Lapham*, 13 Allen, 26; *Joyce v. Adams*, 4 Seld. 236; *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 708; *Willis v. Willis*, 6 Dana, 49; *Whitcomb v. Whitney*, 24 Mich. 486; *Smith v. Dallas*, 35 Ind. 255. The risk attends upon the title, not upon the possession, where there is no special agreement upon the subject: *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 708. The civil-law rule is also *res perit domino suo*; 2 *Bouvier Law Dict. tit. Maxims* (14th ed.), 156. And see *Story on Bailments*, 426; 2 *Kent Com.* 531.

2 *Rugg v. Minett*, 11 East, 210; *Langdell's Cases on Sales*, 647, 651. Because everything had been done by the sellers which was necessary to put the goods in a deliverable state at the warehouse whence they were to be taken by the buyers, so that the property passed to the latter and the goods remained there at their risk: *Rugg v. Minett*, 11 East, 210. So by the civil law the risk of loss before delivery was placed on the buyer, though on condition that the vendor should be guilty of no default in taking care of the thing until he transferred it into the buyer's possession: *Ortolan Explic. Hist.* tome 3, p. 282; *Dig.* 47, 2 de *Furtis*, 14 *Ulp.*

3 *Olyphant v. Baker*, 5 Denio, 379; *Langdell's Cases on Sales*, 635, 638.

4 *Thompson v. Gould*, 20 Pick. 139. See *Phillips v. Moor*, 71 Me. 73, 80; citing, *Tarling v. Baxter*, 9 Dowl. & R. 276; *Hinde v. Whitehouse*, 7 East, 553; *Rugg v. Minett*, 11 East, 210.

5 *Castle v. Playford*, Law R. 5 Ex. 165; Law R. 7 Ex. 98; 1 Eng. Rep. 204. And see *Alexander v. Gardner*, 1 Bing. N. C. 671; *Langdell's Cases on Sales*, 810; *Fragano v. Long*, 4 Barn. & C. 219; *Langdell's Cases on Sales*, 798.

6 As in *Castle v. Playford*, Law R. 5 Ex. 165; Law R. 7 Ex. 98; 1 Eng. Rep. 204; *Martineau v. Kitching*, Law R. 7 Q. B. 436; 2 Eng. Rep. 539.

7 See *Anderson v. Morrice*, 1 Abb. Cas. 713; Law R. 10 Com. P. 58, 609. Source of points and authorities in this and next section: *Bennett's Benjamin on Sales*, §§ 315, 328, 329 *a.*, 410, 411, and notes; 2 *Bouvier Law Dict.* (14th ed.) 156; *Rugg v. Minett*, 11 East, 210; *Langdell's Cases on Sales*, 647, 651; *Olyphant v. Baker*, 5 Denio, 379; *Langdell's Cases on Sales*, 635. And see *Campbell on Sales*, 231-233, 268-273; *Blackburn on Sales*, 1, 2.

§ 162. **Assumption of risk.**—*Instances of.* The purchaser has been held to be liable for the price as assuming the risk of delivery, irrespective of whether there had been a change of property, where the contract provided that he should take upon himself "all risks and dangers of the seas, rivers, and navigation, of whatever nature or kind soever";<sup>1</sup> and similar views have been maintained where the goods paid for in advance and destroyed by fire before they were weighed, were to be "at seller's risk for two months";<sup>2</sup> but in a case where goods were lost with a vessel which sank while loading, no sufficient intention has been deemed manifested by the fact of the buyer's insurance of the goods, and the terms of the policy, that the purchaser should assume the risk of loss before the property has vested in him.<sup>3</sup>

*Recovery of price of destroyed goods.* Where the payment for specific goods sold on credit is to be made at so much by the pound, or bushel, or the like, and the price is not ascertained and cannot be ascertained with precision,<sup>4</sup> in consequence of the goods being lost or destroyed, the seller may, nevertheless, recover the price,<sup>5</sup> if the risk is clearly thrown on the purchaser, by ascertaining the price, as nearly as may be, by evidence competent for the purpose.<sup>6</sup>

1 *Castle v. Playford*, Law R. 5 Ex. 165; Law R. 7 Ex. 98; 1 Eng. Rep. 204.

2 *Martineau v. Kitching*, Law R. 7 Q. B. 436; 2 Eng. Rep. 539.

3 *Anderson v. Morrice*, 1 App. Cas. 713; Law R. 10 Com. P. 58, 609.

4 Price generally: See previous chapter on subject.

5 See citations in next note.

6 See *Martineau v. Kitching*, Law R. 7 Q. B. 455, 456; 2 Eng. Rep. 539; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Langdell's Cases on Sales*, 810; *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692; *Castle v. Playford*, Law R. 7 Ex. 98; 1 Eng. Rep. 204; *McConnell v. Hughes*, 20 Wis. 537.

§ 163. *Stipulations concerning risk, delivery, and payment.*—*Consignee's title, risk, and liability to pay.* As there is no rule of law to prevent parties from making what bargain they please, their intention is effectual, if, as in the common case where goods are ordered to be sent by a carrier to a port of destination, they use words in the contract which show that they intend that the goods shall be shipped by the person who is to supply, on the terms that when shipped they shall be the consignee's property, and at his risk,<sup>1</sup> so that the vendor shall be paid for them,<sup>2</sup> whether delivered at the port of destination or not.<sup>3</sup> And the vendor's duty in such case is at an end when he has delivered the goods to the carrier, so that if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price.<sup>4</sup>

*Seller's undertaking to deliver.* So if the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually

be delivered at their destination,<sup>5</sup> and express such intention, this also is effectual.<sup>6</sup> And in such a case, if the goods perish in the hands of the carrier, the vendor is not only entitled to the price,<sup>7</sup> but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination.<sup>8</sup>

*Intermediate arrangement.* But the parties may intend an intermediate state of things, namely, that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages<sup>9</sup> for a breach of contract if the goods do not reach their destination, while yet the whole or part of the price shall not be payable unless the goods do arrive.<sup>10</sup> And they may accordingly bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, so that they shall then be both sold and delivered, and yet the price in whole or in part shall be payable only on the contingency of the goods arriving.<sup>11</sup>

1 See section 161, on TITLE AND RISK.

2 Payment in general: See 2 Bouvier Law Dict. (14th ed.) 311; 2 Greenleaf on Evidence (14th ed.), §§ 516, 536. And consult subsequent chapter on subject.

3 Calcutta Company v. De Mattos, Law J. 32 Q. B. 322; S. C. Law J. 33 Q. B. 214.

4 See Dunlop v. Lambert, 6 Clark & F. 600.

5 Delivery in general: 1 Bouvier Law Dict. (14th ed.) 452.

6 Calcutta Company v. De Mattos, Law J. 32 Q. B. 322; S. C. Law J. 33 Q. B. 214.

7 Price in general: See previous chapter on subject.

8 See Dunlop v. Lambert, 6 Clark & F. 600.

9 Damages in general: 1 Bouvier Law Dict. (14th ed.) 420; 2 Greenleaf on Evidence, §§ 253, 278.

10 Calcutta Company v. De Mattos, Law J. 32 Q. B. 322; S. C. Law J. 33 Q. B. 214.

11 Calcutta Company v. De Mattos, Law J. 32 Q. B. 322; S. C. Law J. 33 Q. B. 214. Just as they might, if they pleased, contract that the price should not be payable unless a particular tree fell, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to procure the tree to fall: Calcutta Company v. De Mattos, Law J. 32 Q. B. 322.

§ 164. Title to undelivered chattel. — *General rule.* It is the general rule that on the sale of a specific chattel the title thereto passes to the vendee without delivery.<sup>1</sup>

*Illustration.* And where on a sale of lumber then in the vendor's yard the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, it was held that this act to be done by the vendor did not prevent the passing of the title to the purchaser by a sale otherwise complete.<sup>2</sup>

1 *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 455; 29 Am. Rep. 418. And see *Wilkinson v. Haliday*, 33 Mich. 386, 388. But compare *Pettit v. First Nat. Bank*, 4 Bush, 334.

2 *Dixon v. Yates*, 5 Barn. & Adol. 313, 340; *Ross' Leading Cases*, 55. And see *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706, 709; *Chitty on Contracts* (8th Am. ed.), p. 332. See section on TRANSFER OF TITLE WITHOUT PAYMENT OR DELIVERY. For source of points and authorities in this and next section, see *Ferguson v. Northern Bank of Kentucky*, 14 Bush, 455; 29 Am. Rep. 418; *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51; *Wetzel v. Power*, 5 Mont. 217; *Bennett's Benjamin on Sales*, § 315, n. f. here citing following cases: *Ind.* — *Lester v. East*, 49 Ind. 538. *Ky.* — *Sweeney v. Ousley*, 14 Mon. B. 413; *Buffington v. Ulen*, 7 Bush, 221; *Willis v. Willis*, 6 Dana, 43; *Crawford v. Smith*, 7 Dana, 59, 60. *Ohio* — *Hooban v. Bidwell*, 16 Ohio, 509. *Mass.* — *Rice v. Codman*, 1 Allen, 377; *Gardner v. Lane*, 9 Allen, 498; *Thayer v. Lapham*, 13 Allen, 28; *Warden v. Marshall*, 99 Mass. 305; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295; *Marble v. Moore*, 102 Mass. 443; *Martin v. Adams*, 104 Mass. 262; *Morse v. Sherman*, 106 Mass. 430, 432, 433. *Me.* — *Merrill v. Parker*, 24 Me. 83; *Wing v. Clark*, 24 Me. 363; *Waldron v. Chase*, 27 Me. 44; *Means v. Williamson*, 37 Me. 556; *Webber v. Davis*, 44 Me. 147; *Hotchkiss v. Hunt*, 49 Me. 213; *Chase v. Willard*, 57 Me. 157; *Phillips v. Moor*, 72 Me. 78. *N. H.* — *Page v. Carpenter*, 10 N. H. 77; *Felton v. Fuller*, 29 N. H. 121; *Bailey v. Smith*, 43 N. H. 153. *N. Y.* — *Olyphant v. Baker*, 5 Denio, 279; *Langdell's Cases on Sales*, 655, 657; *Terry v. Wheeler*, 25 N. Y. 520, 524, 525; *Bigler v. Hall*, 54 N. Y. 167. *N. C.* — *Hurlburt v. Simpson*, 3 Ired. 233. *S. C.* — *Frazer v. Hilliard*, 2 Strob. 309. *Federal Decision* — *Barrett v. Goddard*, 3 Mason, 107, 110.

3 *Terry v. Wheeler*, 25 N. Y. 520; *Langdell's Cases on Sales*, 706.

§ 165. Delivery sufficient to pass title. — *Marking landed logs.* A survey of a large quantity of logs, landed on a stream preparatory to driving by a person mutually agreed upon by the parties to a sale, and the vendor's putting the purchaser's mark on the logs as they were thus landed, has been held to constitute a sufficient delivery to pass the title, even as against subsequent pur-

chasers,<sup>1</sup> although by the terms of the contract of sale the vendor was bound to deliver the logs at a specified place many miles below the landing.<sup>2</sup>

*Piano left to be finished.* And evidence has been held sufficient to authorize a jury to find a delivery of a piano sufficient to pass the title even as against a subsequent purchaser, where it appeared therefrom that a person offered to purchase a piano at the shop of the maker if he would finish it; that the offer was thereupon accepted, and a bill of sale made; and that the price was paid at a subsequent day, the piano being left to be finished.<sup>3</sup>

*Delivery to common carrier.* It has been held that delivery to a common carrier *prima facie* vests the right to the immediate possession of the property in the consignee; that the law implies by delivery to the carrier that the goods become the property of the consignee; and that the effect of a consignment of goods by a bill of lading is to vest the property in the consignee.<sup>4</sup>

*Shipment to consignee.* But the mere act of shipment would not have the effect to vest the title in the consignee in a case where the consignee had never seen or accepted the property, where there had been no bill of lading nor any notice of shipment, and where the consignor paid freight, and had the right to recall the goods or to change their destination, while the agreement under which the goods were shipped provided that the property should not be credited to the account of the consignor until the same had actually been received and sold by the consignee.<sup>5</sup>

1 Bethel Steam Mill Co. v. Brown, 57 Me. 9.

2 Bethel Steam Mill Co. v. Brown, 57 Me. 9. And see Dyer v. Libby, 61 Me. 45; Filkins v. Whyland, 21 N. Y. 341; Russell v. Carrington, 42 N. Y. 113; 1 Am. Rep. 403; Cummings v. Griggs, 2 Duval, 87; Bertelson v. Bower, 81 Ind. 512.

3 Thorndike v. Bath, 114 Mass. 116. And see Bates v. Coster, 3 Thomp. & C. 530.

4 *Wetzel v. Power*, 5 Mont. 217; S. C. 2 Pac. Rep. 338. See *Walsh v. Blakely*, 9 Pac. Rep. (Mont.) 809.

5 *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51.

§ 166. **Delivery as prerequisite to transfer of title.**—*Where engagement to deliver at certain place, etc.* The general rule is that title will not pass until delivery, if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery,<sup>1</sup> and it is declared that the property in a specified chattel bought in a shop, to be paid for upon being sent home, does not pass before delivery,<sup>2</sup> and that if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that in the mean time the thing sold was to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly.<sup>3</sup>

*Applications of rule.* The general rule has been applied to the shipment of the cargo of a vessel captured after war had been declared between the United States and Great Britain, and claimed by the consignees, who were American citizens;<sup>4</sup> to the loading of a buyer's barges with coal, which was attached by the seller's creditors before the barges could be floated to the place of destination;<sup>5</sup> to determine the place of sale on the setting apart of bottles of liquor afterwards carried to the purchaser;<sup>6</sup> and to a case where there was deficiency claimed in the quantity of milk in cans sent to the buyer by railroad.<sup>7</sup>

*Shipment to pay for advances.* The rule<sup>8</sup> is that if there is a mere agreement to ship goods or produce to pay for advances, the property shipped would not belong to the consignee until actually received and possessed by him.<sup>9</sup> But if the agreement appropriates specific property to the payment of such advances, and



such appropriation is evidenced and authenticated by a bill of lading, then the title to the property passes to the consignee by a delivery to the carrier.<sup>10</sup>

1 1 Corbin's Benjamin on Sales, § 325, giving illustrations later stated. But slight evidence is accepted as sufficient to show that title passes immediately on the sale though the seller is to make a delivery: 1 Corbin's Benjamin on Sales, § 325. Compare 2 Schouler on Personal Property, § 245.

2 See 1 Smith's Leading Cases (Eng. ed. 1879), p. 164.

3 Calcutta Co. v. De Mattos, Law J. 32 Q. B. 322, 355. See Bennett's Benjamin on Sales, § 330, n. e., asserting that the statement made in the text as to goods bought in a shop is perhaps correct as one of presumption, but that the real test is the intention of the parties to make delivery by the vendor in the nature of a condition precedent. And citing Boynton v. Veazie, 24 Me. 286; Weld v. Cane, 98 Mass. 152; Lint v. Woodhall, 113 Mass. 394; Goddard v. Binney, 115 Mass. 455; 15 Am. Rep. 112.

4 The Venus, 8 Cranch, 253, 275.

5 Swenthers v. Grubbs, 88 Pa. St. 147, 150. And see Fry v. Lucas, 29 Pa. St. 356; McCandlish v. Newman, 22 Pa. St. 430.

6 Commonw. v. Greenfield, 121 Mass. 140. And compare Suit v. Woodhall, 113 Mass. 391, 394.

7 Devine v. Edwards, 101 Ill. 138. See further on this subject, The Elgee Cotton Cases, 22 Wall. 180, 192; Holliday v. Hamilton, 11 Wall. 560, 564; Thompson v. Cinn. R. R. 1 Bond, 152; Pierson v. Hoag, 47 Barb. 243; Underhill v. Muskegon Boom Co. 40 Mich. 660.

8 Clearly illustrated by the case of Holliday v. Hamilton, 11 Wall. 564.

9 First Nat. Bank v. McAndrews, 5 Mont. 325; 51 Am. Rep. 51.

10 First Nat. Bank v. McAndrews, 5 Mont. 325; 51 Am. Rep. 51.

§ 167. *Delivery not such prerequisite.*—*Express or implied intent.* Although the general rule makes delivery when stipulated to be made at a particular place a prerequisite to the transfer of the title,<sup>1</sup> yet property passes at once on the sale, if such is the intent, though the seller is afterwards to make a delivery of the goods;<sup>2</sup> and such intent may be expressly declared,<sup>3</sup> or may be inferred from circumstances.<sup>4</sup>

*When intent inferred.* And in the absence of an express agreement, the intent that title shall pass at once by the contract, although the seller is to deliver, is inferred where the buyer is to give notice of time or place of delivery,<sup>5</sup> where payment in full is made,<sup>6</sup> where

the buyer employs the seller to remove the property,<sup>7</sup> or where there is other evidence that the continued possession of the seller is merely for the convenience of the buyer,<sup>8</sup> or that the removal of the goods is made by the seller as agent for the buyer;<sup>9</sup> nor where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, is there room for an inference that the property remains the seller's merely because he has engaged to transport the goods to a given point.<sup>10</sup>

1 See last section, on DELIVERY AS PREREQUISITE, etc.

2 1 Corbin's Benjamin on Sales, § 329.

3 As in *Lynch v. O'Donnell*, 127 Mass. 311. Compare *Commonw. v. Greenfield*, 121 Mass. 40.

4 See citations in succeeding notes.

5 *Weld v. Cane*, 98 Mass. 152. And see *Higgins v. Cheesman*, 9 Pick. 7.

6 See *Terry v. Wheeler*, 25 N. Y. 525.

7 *Lingham v. Eggleston*, 27 Mich. 324. And see *Whitcomb v. Whitney*, 24 Mich. 486; *Newcomb v. Cabell*, 10 Bush, 460, 463; *Shelton v. Franklin*, 68 Ill. 333, 338.

8 See *Bethel Steam Mills Co. v. Brown*, 57 Me. 9.

9 *Hobbs v. Carr*, 127 Mass. 532. And see *Terry v. Wheeler*, 25 N. Y. 525.

10 *Terry v. Wheeler*, 25 N. Y. 520, 525. And see *Hunter v. Wetsell*, 84 N. Y. 549, 555; *Gray v. Mayor of New York*, 46 N. Y. Sup. Ct. 494. Compare *Bethel Steam Mills Co. v. Brown*, 57 Me. 9; *Boynton v. Veazie*, 24 Me. 286; *Underhill v. Boom Co.* 40 Mich. 660; *Muskegon Boom Co. v. Underhill*, 43 Mich. 629. And consult 1 Corbin's Benjamin on Sales, §§ 320-332, stating illustrations given in paragraph.

§ 163. *Estoppel of seller. — By active inducements, etc.* In general, if the seller by his words or conduct actively induces the buyer's creditors to believe that the buyer's title to an article is absolute and unconditional, he will be estopped from afterwards setting up the conditions of that sale as against such creditors.<sup>1</sup>

*Delay in bringing replevin, etc.* But when the buyer's creditors get possession wrongfully, delay of a few months in bringing replevin for the chattels, though expense was incurred by the wrong-doer in the care of

them in the mean time, cannot be set up as an estoppel to the seller,<sup>2</sup> if the latter never induced the taking or withholding of the chattels.<sup>3</sup>

1 Wylie's Appeal, 90 Pa. St. 210. So one who puts chattels into the hands of another, with the understanding that the latter shall sell them as his own, is estopped from asserting his title as against an attaching creditor of the bailee representing himself to be the owner: *Drew v. Kimball*, 43 N. H. 282.

2 *Hull v. Hull*, 48 Conn. 250.

3 *Hull v. Hull*, 48 Conn. 250; 2 Schouler on Personal Property (2d ed.), p. 554, § 541, whence this and last paragraph derived. Estoppel of bankrupt manufacturer and his assignees by obtaining part payment for engine on false representation that it was finished: *Ex parte Rockford R. R. Co.* 1 Low. 345. See 2 Schouler on Personal Property (2d ed.), § 543.

§ 169. Estoppel of warehouseman, etc. — *Against seller and sub-buyer.* Upon the principle of estoppel, warehousemen and other bailees may render themselves liable not only to the sub-buyer, because of conduct inducing him to take a course otherwise prejudicial to his interests,<sup>1</sup> but also to the original seller, if such conduct was unauthorized by him, and the goods should have continued to be held for him.<sup>2</sup>

*By attornment to sub-vendee.* Whatever might be the rule between buyer and seller,<sup>3</sup> a warehouseman or agent who has once attorned to a party as sub-vendee cannot afterwards disaffirm his acts and admissions,<sup>4</sup> and dispute the sub-vendee's title to the goods.<sup>5</sup>

*By keeping delivery order.* So it has been held in the British provinces of America that where a warehouseman receives from a vendee the delivery order of a vendor, and keeps it for over a month in his possession without notifying the vendee that the property does not belong to the person who made the delivery order, such warehouseman is liable to the vendee for the goods mentioned in the order.<sup>6</sup>

1 2 Schouler on Personal Property (2d ed.), § 544. Liability to original buyer: See later paragraph of section.

2 2 Schouler on Personal Property (2d ed.), § 544.

3 See *Stonard v. Dunkin*, 2 Camp. 344; *Langdell's Cases on Sales*, 653.

4 2 Schouler on Personal Property (2d ed.), § 544.

5 See *Stonard v. Dunkin*, 2 Camp. 344; *Langdell's Cases on Sales*, 653; *Hawes v. Watson*, 2 Barn. & C. 540; *Langdell's Cases on Sales*, 653; *Gosling v. Birnie*, 7 Bing. 339; *Gillett v. Hill*, 2 Crompt. & M. 536; *Langdell's Cases on Sales*, 755; *Hall v. Griffin*, 10 Bing. 246; *Lucas v. Dorrien*, 7 Taunt. 278; *Woodley v. Coventry*, 2 Hurl. & C. 164; 32 Law J. Ex. 187; *Langdell's Cases on Sales*, 760; *Bennett's Benjamin on Sales* (4th Am. ed.), p. 893, § 781, so citing these cases, and referring also to *Swanwick v. Southern*, 9 Ad. & E. 835; *Langdell's Cases on Sales*, 673; *Biddle v. Bond*, 6 Best & Smith, 225; 34 Law J. Q. B. 137; *Knights v. Wiffen*, Law R. 5 Q. B. 660; *Langdell's Cases on Sales*, 766; *Barnard v. Campbell*, 55 N. Y. 456; *Voorhis v. Olmstead*, 66 N. Y. 113; *Schouler on Bailments*, 119. A warehouseman is estopped from denying the title of the one to whom he gives his receipt: *Chapman v. Searle*, 3 Pick. 38, 43; *Hurff v. Hires*, 40 N. J. L. 531, 531; *Adams v. Gorham*, 6 Cal. 63; *Goodwin v. Scaxwell*, 6 Cal. 541; as cited, 2 Corbin's *Benjamin on Sales* (Am. ed.), p. 1007, § 1155, n. 12; which also refers in note a to *Farmeloe v. Bain*, Law R. 1 C. P. D. 445; *Waterhouse v. London etc. Ry. Co.* 41 L. T. N. S. 553; *Simm v. Anglo-Amer. Tel. Co.* 5 Q. B. D. 183; *Webb v. Herne Bay Commrs.* Law R. 5 Q. B. 542; *In re Bahia etc. Ry. Co.* Law R. 3 Q. B. 534; *Hart v. Frontino Gold Mg. Co.* Law R. 5 Ex. 111.

6 See *Twining v. Oxford*, 2 Thomson, 18; *Hogan v. Frederickton Boom Co.* 2 Pugs. & B. 165; *Davis v. Brown*, 9 Up. Can. Q. B. 193; *Holten v. Samson*, 11 Up. Can. C. P. 606. See *Bennett's Benjamin on Sales* (4th Am. ed.), p. 893, § 731, n. f, so citing these cases.

## CHAPTER XIV.

## BONA FIDE PURCHASERS.

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- § 172. Goods in another's wrongful possession.
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- § 176. Purchase of stolen goods.
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- § 185. Transfers of unforfeited pledges.
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- § 203. Statements of doctrine.
- § 204. Prevalence of exemption.
- § 205. Limitations upon exemption.
- § 206. Obtaining goods by false pretenses.

170. *General doctrines.*—*Principle concerning divesting of property.* The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent;<sup>1</sup> and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor.<sup>2</sup>

*No better title conferred than possessed.* For since no one can give what he does not possess,<sup>3</sup> or sell a right when he has none to dispose of,<sup>4</sup> it ordinarily follows that no one can confer a better title<sup>5</sup> than he has.<sup>6</sup>

*Purchaser takes seller's interest.* Hence, the general rule is stated to be, that a purchaser of personal property takes only such title as his seller has, and is authorized to transfer;<sup>7</sup> in other words, that he acquires precisely the interest that the seller has, and no other or greater.<sup>8</sup>

*Seller's want of title or authority.* He accordingly takes the property, in most cases, subject to vital infirmities in the title which he may afterwards discover.<sup>9</sup> Hence, he usually gains no title whatever if it turns out that the goods were found,<sup>10</sup> or stolen,<sup>11</sup> or seized or converted by the seller,<sup>12</sup> and this principle prevails no matter how long the chain of transfers.<sup>13</sup> And whenever a person purchases an article from a party without title or authority to dispose of the article, such purchaser acquires no title,<sup>14</sup> but the true owner has a right to reclaim his property, and to hold any one responsible who has assumed the right to dispose of it.<sup>15</sup>

*Caveat emptor, etc.* For the common-law maxim *caveat emptor*,<sup>16</sup> which is applicable to such cases,<sup>17</sup> requires the purchaser to be on his guard,<sup>18</sup> as he ought not to be ignorant that he is purchasing the rights of another.<sup>19</sup> And the doctrine that the state of the title

governs<sup>20</sup> has been formulated under the civil law in the declaration that the sale of another's property is a nullity.<sup>21</sup>

*Recourse against seller.* The purchaser must, therefore, look to the seller for indemnity,<sup>22</sup> and the buyer's only recourse against the seller is, in general, upon any warranty of title which may be directly given, or may be implied<sup>23</sup> from the transaction.<sup>24</sup>

*Exceptions to general rule.* But there are in this country apparent exceptions to these rules, or modifications thereof,<sup>25</sup> in the cases of transfers of negotiable instruments,<sup>26</sup> *bona fide* purchasers from fraudulent buyers,<sup>27</sup> or others having a voidable or defeasible title,<sup>28</sup> and under statutory regulation, from factors and those intrusted with documents of title,<sup>29</sup> as well as in other cases where the person having title to the goods is deemed estopped from claiming them on account of the apparent ownership or authority which he has conferred upon another.<sup>30</sup>

1 *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Jennings v. Gage*, 13 Ill. 610; 56 Am. Dec. 476, 480; citing, *Ash v. Putnam*, 1 Hill, 303; and cited, *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 281. No divesting of owner's rights save by his own act or by operation of law: 2 Schouler on Personal Property, § 25; citing, also, *Quinn v. Davis*, 78 Pa. St. 15. See present writer's article on "Conversion by Purchase," 15 Am. Law Rev. 363, for discussion of entire subject.

2 *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Evansville etc. R. R. Co. v. Erwin*, 84 Ind. 457, 466; *Mayes v. Bruton*, 1 Tex. App. Civ. Cas. § 699.

3 *Nemo dat quod non habet*, per Willes, J., in *Whistler v. Foster*, 14 Com. B. N. S. 248; quoted, *Barnard v. Campbell*, 55 N. Y. 456, 469. And see *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 176.

4 *Fawcett v. Osborn*, 32 Ill. 425; 83 Am. Dec. 278, 282. And see *McCully v. Hardy*, 13 Ill. App. 631.

5 See *Wright v. Solomon*, 19 Cal. 64; 79 Am. Dec. 196, 202; *Klein v. Seibold*, 89 Ill. 540, 542.

6 *Nemo plus juris ad alium transferre potest quam ipse habet*: *Broom's Legal Maxims*, 452; quoted, *Barnard v. Campbell*, 55 N. Y. 456, 460. And see *Ventress v. Smith*, 10 Peters, 161, 175; *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 176. No one can transfer a greater right or better title to property than he possesses himself: *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180, 184; 4 N. E. Rep. 433, 436. And see *Wheelwright v. Depeyster*, 1 Johns. 471; 3 Am. Dec. 345, 346; *Hamet v. Letcher*, 37 Ohio St. 356; 41 Am. Rep. 519, 521; *Gibbs v.*

Jones, 46 Ill. 319, 321. It is a maxim alike of the common and civil law, that no one can transfer to another a better title than he has himself: 2 Kent Com. 324; Evansville etc. R. R. Co. v. Erwin, 84 Ind. 457, 466.

7 Barnard v. Campbell, 55 N. Y. 456, 460. See note to Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604, 606.

8 Barnard v. Campbell, 55 N. Y. 456, 460; quoted in article on "Title from Fraudulent Vendees," 7 South Law Rev. N. S. 559. A sale *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor: 2 Kent Com. 324; Evansville etc. R. R. Co. v. Erwin, 84 Ind. 457, 466.

9 Per Lord Chancellor Cairns, in Cundy v. Lindsay, Law R. 3 App. C. 463; 14 Eng. Rep. 345.

10 See Sherwood v. Meadow Valley Mining Co. 50 Cal. 412.

11 See remarks of Lord Chancellor Cairns, in Cundy v. Lindsay, Law R. 3 App. C. 463; 24 Eng. Rep. 345; Breckenridge v. McAfee, 54 Ind. 141; Sharp v. Parks, 43 Ill. 511; Galvin v. Bacon, 2 Fairf. 30, 31; 25 Am. Dec. 258.

12 See "Conversion by Purchase," 15 Am. Law Rev. 363, 369, 370; Story on Sales, § 188.

13 See Parham v. Riley, 4 Cold. 9; Story on Sales, § 188. The real owner is entitled to follow his property, and reclaim it wherever found: Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 285.

14 See note to Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604, 606; Carmichael v. Buck, 10 Rich. 332; 70 Am. Dec. 226, 227.

15 Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604.

16 See 1 Bouvier Law Dict. (14th ed.) 248; Broom's Legal Maxims, (5d Lond. ed.) 690.

17 See Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604; McCully v. Hardy, 13 Ill. App. 631.

18 See Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 285.

19 2 Bouvier Law Dict. tit. Maxims (14th ed.), 119.

20 See Roberts v. Dillon, 3 Daly, 50; quoting, Hartop v. Hoare, 3 Atk. 40.

21 Code Napoleon, art. 1599; Story on Sales, § 188.

22 Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604.

23 See Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 282; Klein v. Seibold, 83 Ill. 540, 542.

24 See 2 Schouler on Personal Property, § 19, p. 22. And consult subsequent chapter on WARRANTY.

25 See Leigh v. Mobile etc. R. R. Co. 53 Ala. 165, 176, et seq.; § 174, on APPARENT EXCEPTIONS.

26 See Barnard v. Campbell, 55 N. Y. 456, 460; quoted, "Title from Fraudulent Vendees," 7 South Law Rev. N. S. 559. And consult Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 281.

27 See Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 664; Rowley v. Bigelow, 12 Pick. 307; 23 Am. Dec. 607; Barnard v. Campbell, 65 Barb. 286; affirmed on appeal, 55 N. Y. 456; motion for re-argument denied, 58 N. Y. 73, or 17 Am. Rep. 208.

28 See Stevens v. Hyde, 32 Barb. 180; Rowley v. Bigelow, 12 Pick. 307; 23 Am. Dec. 607; "Conversion by Purchase," 15 Am. Law Rev. 363, 370.



29 See chapters on FACTORS' ACTS, and on DOCUMENTS OF TITLE. And in England in the case of sales in markets overt: See *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 282, 283. And consult §§ 178, 180.

30 See *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; as quoted, *Barstow v. Savage Mining Co.* 64 Cal. 385; 49 Am. Rep. 705. And consult § 175, on OSTENSIBLE OWNERSHIP, etc.

§ 171. Title only from owner, etc. — *Owner or authorized representative, etc.* The general rule that only the owner of goods or his authorized representative can by a sale of personal property convey a valid title to the purchaser,<sup>1</sup> has been sustained<sup>2</sup> by decisions in Maine,<sup>3</sup> Vermont,<sup>4</sup> New Hampshire,<sup>5</sup> Massachusetts,<sup>6</sup> New York,<sup>7</sup> Missouri,<sup>8</sup> Illinois,<sup>9</sup> and England.<sup>10</sup> Thus, no title is gained by one who purchased a pair of diamond earrings in good faith, and without notice of the want of authority to sell, on the part of the vendor, who had been intrusted with the property to show to his customers.<sup>11</sup> And it has been held that one who has bought property under an arrangement which would be fraudulent as against the creditors of the vendor, or by an unratified sale in which the vendor's agent has exceeded his authority, obtains no title which he can protect from attachments sued out by the vendor's creditors.<sup>12</sup> So it is declared to be the general rule of law that in the absence of authority, or of property, a sale or a pledge of chattels confers no title, even when the person making it is in possession,<sup>13</sup> and the person to whom it is made pays a valuable consideration, or advances money in good faith, and without notice of the right or title of the true owner.<sup>14</sup>

*Goods in possession of wrong-doer.* But the goods need not be in the actual possession of the owner, but may be in the possession of a third party who wrongfully withholds them;<sup>15</sup> and the sale in such cases is not a sale of a right of action, but of the thing itself.<sup>16</sup>

*Thing not yet owned or existing.* So a person may make a valid agreement to sell a thing not yet his,<sup>17</sup> or even<sup>18</sup> a thing not yet in existence.<sup>19</sup>

- 1 See *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604, 606, n.
- 2 According to authorities cited in Bennett's Benjamin on Sales § 6, n. a. Compare *Story on Sales*, § 188; *Campbell on Sales*, 32, 33, 33. Liability of agent to owner for unauthorized sale: See *Wellington v. Morey*, 90 N. Y. 656.
- 3 See *Parsons v. Webb*, 8 Greenl. 38; *Galvin v. Bacon*, 2 Fairf. 28; 25 Am. Dec. 253; *Prime v. Cobb*, 63 Me. 200.
- 4 *Riford v. Montgomery*, 7 Vt. 418; *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174.
- 5 *Bryant v. Whitcher*, 52 N. H. 158.
- 6 *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Riley v. Boston Water Power Co.* 11 Cush. 11; *Gilmore v. Newton*, 9 Allen, 171; *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739; *Kinder v. Shaw*, 2 Mass. 308; *Bearce v. Bowker*, 115 Mass. 129; *Moody v. Blake*, 171 Mass. 23; 19 Am. Rep. 394.
- 7 *Barrett v. Hill*, 3 Hill, 348; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604.
- 8 *Wilson v. Crocker*, 43 Mo. 218.
- 9 *Klein v. Seibold*, 89 Ill. 540.
- 10 *Whistler v. Forster*, 32 Law J. Com. P. 545; *Peer v. Humphreys*, 2 Ad. & E. 161.
- 11 *Smith v. Clews*, 33 Hun, 501, 504.
- 12 *Newburn v. Woods*, 52 Mich. 610, 611.
- 13 See *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 282; *Smith v. Clews*, 33 Hun, 501, 504.
- 14 *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 176; citing, 1 Smith's Leading Cases (5th Am. ed.), 82, 893; *Barnard v. Campbell*, 55 N. Y. 436; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643.
- 15 See the *Brig Sarah Ann*, 2 Sum. 211.
- 16 See *The Brig Sarah Ann*, 2 Sum. 211. Same effect, according to Bennett's Benjamin on Sales, § 6, n. a; *Hubbard v. Bliss*, 12 Allen, 530; *Carpenter v. Hale*, 8 Gray, 157; *First Ward Nat. Bank v. Thomas*, 125 Mass. 278; *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147. Reference is also made in note mentioned to *Tome v. Dubois*, 6 Wall. 551; *Boynton v. Willard*, 10 Pick. 166; *First Nat. Bank v. Crocker*, 111 Mass. 163; *Hassell v. Borden*, 111 Me. 128; *Zabriskie v. Smith*, 3 Kern. 222.
- 17 See *Bruce v. Bishop*, 43 Vt. 161, 163.
- 18 See § 63, under chapter on THING SOLD.
- 19 Bennett's Benjamin on Sales, § 6. And see *Story on Sales*, §§ 185, 186; 2 Schouler on Personal Property, §§ 209, 210; 2 Kent Com. 463; *Low v. Pew*, 108 Mass. 347; 11 Am. Rep. 257.

§ 172. Goods in another's wrongful possession.—No sale by wrongful possessor. One wrongfully in possession of goods<sup>1</sup> cannot sell them.<sup>2</sup>

*No transfer, formerly, of goods adversely claimed.* And it was formerly held that no transfer could be made of goods held by another under adverse claim of title,<sup>3</sup> because such claim was considered a mere chose in action,<sup>4</sup> and therefore<sup>5</sup> not assignable.<sup>6</sup>

*Different modern view.* But these cases seem to be against the modern authorities which proceed upon the theory that the owner is not bound to treat an invasion of his right as a tortious conversion, but may waive the tort and sell and convey a good title.<sup>7</sup>

1 Possession in general: 2 Bouvier Law Dict. (14th ed.) 349.

2 1 Corbin's Benjamin on Sales, § 6, n. 1, citing following cases: *Me.* — *Prime v. Cobb*, 63 Me. 200. *Mass.* — *Pearce v. Bowker*, 115 Mass. 129; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394. *N. Y.* — *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Hoffman v. Carow*, 22 Wend. 285, 290; *Brown v. Peabody*, 13 N. Y. 121; *Wooster v. Sherwood*, 25 N. Y. 278, 286; *McGoldrick v. Willetts*, 52 N. Y. 612. *N. J.* — *Ruckman v. Decker*, 8 Green, C. E. 283. *Ill.* — *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Creighton v. Sanders*, 89 Ill. 543. *Fed. Cts.* — *The Fanny*, 9 Wheat. 658; *Ventress v. Smith*, 10 Peters, 176.

3 See citations later given.

4 See that title: 1 Bouvier Law Dict. (14th ed.) 265. Consult, also, 1 Schouler on Personal Property, § 11.

5 See 1 Schouler on Personal Property, § 72.

6 1 Corbin's Benjamin on Sales, § 6, n. p. 13; citing, *Gardner v. Adams*, 12 Wend. 237; *Overton v. Williston*, 31 Pa. St. 160; *Dunklin v. Wilkins*, 5 Ala. 199; *Young v. Ferguson*, 1 Litt. 298; *Stogdel v. Fugate*, 2 Marsh. A. K. 136.

7 See *Tome v. Dubois*, 6 Wall. 548; *Hall v. Robinson*, 2 N. Y. 293; criticising *Gardner v. Adams*, 12 Wend. 237; *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; *Carpenter v. Hale*, 8 Gray, 157; so cited, 1 Corbin's Benjamin on Sales, § 6, n. p. 13.

§ 173. *Judicial sales. — Governed by general rule.* It is, as has been shown,<sup>1</sup> a general rule of law, though subject to many exceptions, that no man can by his sale transfer to another the right of ownership in a thing wherein he has no property.<sup>2</sup> Nor is the rule different where the purchaser takes his title through a judicial sale.<sup>3</sup>

*No warranty of title.* For in all such sales the doctrine of *caveat emptor* applies,<sup>4</sup> since the officer selling has no power to warrant the title, while the purchaser

is presumed to have examined the title, and to know what he is acquiring by his purchase.<sup>5</sup>

1 See § 170, on GENERAL DOCTRINES.

2 McCully v. Hardy, 13 Ill. App. 631; citing, Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278; Burton v. Curvea, 40 Ill. 320; Jones v. Nellis, 41 Ill. 432; Gibbs v. Jones, 46 Ill. 329; Klein v. Seibold, 89 Ill. 540.

3 McCully v. Hardy, 13 Ill. App. 631.

4 See Fore v. McKenzie, 48 Ala. 115, 117. *Caveat emptor* in general: See Lynch v. Postelthwaite, 7 Martin N. S. 183; as noted, Winfield's Words and Phrases, 96; also, Hargous v. Stone, 5 N. Y. 73; Broom's Legal Maxims, 777; and Wharton's Legal Maxims, as quoted, 1 Abbott's Law Dict. 195.

5 See McManus v. Keith, 49 Ill. 388; Bishop v. O'Connor, 69 Ill. 431; Holmes v. Shaver, 78 Ill. 573; Roberts v. Hughes, 81 Ill. 133; Owings v. Thompson, 3 Scam. 502; England v. Clarke, 4 Scam. 486; so cited, McCully v. Hardy, 13 Ill. App. 631.

§ 174. **Apparent exceptions.**—*Several recognized.* There are several recognized exceptions to the general rule of law,<sup>1</sup> that a sale or pledge of a chattel by a person who, though he has possession, has no right of property and no authority to sell, confers no title as against the true owner, although the purchaser pays a valuable consideration, or advances money in good faith, and without notice of the title of the true owner.<sup>2</sup>

*Currency and negotiable instruments.* Thus, one exception to the rule that no man can by his sale transfer to another the right of ownership in a thing wherein he himself had not the right of property, occurs in the instances of cash, bank bills, checks, and notes payable to bearer or transferable by delivery in the ordinary course of business, to a person taking them *bona fide*, and paying value for them.<sup>3</sup>

*Fraudulent sales.* Another class of cases said to be exceptions to the general rule that "no one can transfer to another a better title than he has himself," is where the owner, with the intention of sale, parts with the property, though under such circumstances of fraud as would authorize him to reclaim it from the vendee,<sup>4</sup> in which event the title of a *bona fide* purchaser from

the vendee, who was innocent and ignorant of the fraud, would prevail over that of the original vendor.<sup>5</sup>

*Reserving title or right of reclamation.* Some of the cases not following the current of authority<sup>6</sup> raise another exception in the case of an immediate sale, under which the purchaser takes possession, with a condition annexed, that on his failure to pay the price at a future day the vendor may reclaim the goods, or a stipulation that the title shall remain in him until the price is paid,<sup>7</sup> in which events the title of a sub-purchaser, without notice of the condition or stipulation, is held to prevail over that of the vendor.<sup>8</sup>

*Conferring apparent ownership or authority.* Still another class of cases forming an exception to the general rule<sup>9</sup> is when the owner of goods, by his own act or consent, has given another such evidence of a right to sell, or otherwise dispose of them, as according to the customs of trade or the common understanding of the world, usually accompanies the authority to sell or dispose of goods;<sup>10</sup> and then, if the person intrusted with the possession of the goods, and with the *indicia* of ownership, or of authority to sell or otherwise dispose of them, violates his duty to the owner and sells to an innocent purchaser, the sale will prevail against the right of the owner.<sup>11</sup>

1 See § 170, on GENERAL DOCTRINES, and note to *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604, 606.

2 *Leigh v. Mobile etc. R. R. Co.* 53 Ala. 165, 176. General rule is that purchaser for value of personal property takes no better title than his vendor: See note to *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 285; citing, *Agnew v. Johnson*, 62 Am. Dec. 303, n. 307; *Car-michael v. Buck*, 70 Am. Dec. 226, n. 230.

3 *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 281, 282. And see note to *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604, 610, 611; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196, 202; *Putnam v. Lamphier*, 36 Cal. 151, 158.

4 See citations in next note.

5 *Leigh v. Mobile etc. R. R. Co.* 53 Ala. 165, 178, 179; citing, *Hoffman v. Noble*, 6 Met. 73; 39 Am. Dec. 711; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394.

6 See *Putnam v. Lamphier*, 36 Cal. 151, 158; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Jennings v. Gage*, 13 Ill. 610; 56 Am. Dec. 476, 480; referring to *Braylen v. Brooks*, 22 Me. 463; *Dresser Manuf. Co. v. Waterston*, 3 Met. 9; and 2 Kent Com. 497.

7 See citations in next note.

8 *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 176, 177; citing, *Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, 52 Ala. 572, apparently on validity of condition between the parties. But this exception to the general rule, which is founded on the policy of the registration laws, is confined to cases where there has been an actual sale, as well as a change of possession: *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 177; citing, *Lehigh Co. v. Field*, 8 Watts & S. 232; *Lester v. McDowell*, 18 Pa. St. 91; *Chamberlain v. Smith*, 44 Pa. St. 431.

9 See *Saltus v. Everett*, 20 Wend. 278; 32 Am. Dec. 541; note to *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 611, 612.

10 *Leigh v. Mobile etc. R. R. Co.* 53 Ala. 165, 178.

11 *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 178. And see *Barstow v. Savage Mining Co.* 64 Cal. 333; 49 Am. Rep. 705; quoting, *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; and distinguishing *Winter v. Belmont Mining Co.* 53 Cal. 428. Compare *Arnold v. Johnson*, 66 Cal. 402.

§ 175. **Ostensible ownership or authority.**—*Possession alone.* Possession is *prima facie* evidence of the ownership of all species of personal property.<sup>1</sup> But the mere possession of goods, without some other evidence of property, or of authority from the owner to sell, will not enable the possessor to transfer a better title than he has himself.<sup>2</sup> Whoever deals alone on the faith of possession of the goods, must accept it as such, and in subordination to the paramount title, which would prevail over it, if the possession was not changed by the transaction into which he enters.<sup>3</sup> And a case does not fall within the exception unless the owner confers on the vendor other evidences of ownership, or of authority to dispose of the goods, than mere possession.<sup>4</sup>

*Indicia of title also.* But the real owner suffering the vendor to have the possession, and delivering to him documentary evidence of title, thus enables him to hold himself out to the world as the true owner, and if any loss happens,<sup>5</sup> he who has thus clothed the vendor with the power to deceive ought to bear the loss.<sup>6</sup>

*Apparent ownership or right of selling.* The question which determines in such cases whether the purchaser

is protected or not, is whether the real owner has conferred on the vendor the apparent ownership or right of selling.<sup>7</sup> For when the owner of property confers upon another an apparent title to, or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner.<sup>8</sup> And the owner of corporate stock who voluntarily delivers the indorsed certificates to a third person, and thus allows him to assume the apparent ownership of the stock, cannot, at least without payment of the debt secured, recover the same from a *bona fide* pledge of the apparent owner.<sup>9</sup>

1 Leigh v. Mobile etc. R. R. Co. 53 Ala. 165, 178. And see Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 282, n. 285; citing, Avery v. Clemons, 46 Am. Dec. 323; Magee v. Scott, 55 Am. Dec. 49; Dick v. Cooper, 64 Am. Dec. 652.

2 See Covill v. Hill, 4 Denio, 323; Barstow v. Savage Mining Co. 64 Cal. 333, 391; 49 Am. Rep. 705.

3 Leigh v. Mobile etc. R. R. Co. 53 Ala. 165, 178. If this was not true, a felon acquiring possession by theft could, by a sale to the true owner of his property, and a naked bailee, intrusted with possession, dispose of goods to the prejudice of his principal: Leigh v. Mobile etc. R. R. Co. 53 Ala. 165, 178. But these things they cannot do: See § 176, on PURCHASE OF STOLEN GOODS, and § 184, on UNAUTHORIZED SALES BY BAILEES.

4 McMahon v. Sloan, 12 Pa. St. 229; as cited in Leigh v. Mobile etc. R. R. Co. 53 Ala. 165, 173; which reviews Andrews v. Dietrich, 14 Wend. 31; Saltus v. Everett, 20 Wend. 267; 32 Am. Dec. 541; Pickering v. Busk, 15 East, 38.

5 See Saltus v. Everett, 20 Wend. 273; 32 Am. Dec. 541; quoted in note to Williams v. Merle, 25 Am. Dec. 612.

6 Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 284. And see Jennings v. Gage, 13 Ill. 610; 56 Am. Dec. 476, 477.

7 See note to Williams v. Merle, 25 Am. Dec. 612.

8 McNeill v. Tenth Nat. Bank, 46 N. Y. 325; as quoted, Barstow v. Savage Mining Co. 64 Cal. 333, 393; 49 Am. Rep. 705.

9 Arnold v. Johnson, 66 Cal. 402; distinguishing, Barstow v. Savage Mining Co. 64 Cal. 383; 49 Am. Rep. 705; referring to Ambrose v. Evans, 66 Cal. 74.

§ 176. Purchase of stolen goods.—*No transfer of title.* A thief cannot acquire any title to stolen property, by means of a larceny thereof, and as he has no rightful possession against the true owner, he can confer no title

thereto on his vendees.<sup>1</sup> And where goods or other kinds of property have been stolen, or taken by robbery, no sale, or number of sales, can affect the title of the true owner; <sup>2</sup> so that however remote the buyer may be in the chain of transfers, the owner can recover the goods from him.<sup>3</sup>

*Liability for conversion.* Hence it may be generally stated that the consummated purchase of stolen goods is a conversion,<sup>4</sup> at least if the buyer retains the property and withholds it from the true owner after demand,<sup>5</sup> or otherwise exercises direct dominion over it, as by letting it to a third person.<sup>6</sup>

*Good faith of purchaser.* And it is immaterial that the purchase is made in the best of faith, for full value, and without knowledge or notice of the theft,<sup>7</sup> as in the case of a stolen horse bought at public auction,<sup>8</sup> in utter ignorance of the larceny or the owner's rights;<sup>9</sup> for though a party who honestly and fairly, and for a valuable consideration, buys goods of one who has stolen them, is not liable to be charged criminally, because innocent of any intentional wrong, yet as he acquired no rights under his purchaser, the owner may avail himself against him of all civil remedies provided by law for the protection of property.<sup>10</sup> Thus, it has been held that where stock of a corporation stands on the books in the name of one party, and the stock is owned by another, from whom the certificates, though properly indorsed, are stolen without the fault of such other, the thief can pass no title to an innocent purchaser of the certificates, and the owner may pursue his property though it has been still further transferred.<sup>11</sup>

*Character of larceny.* Nor does it matter whether the possession of the goods be obtained by stealth, as in larceny at common law which required asportation by trespass, or they are intrusted to the party as in statu-



tory larceny, like that committed by a farm laborer who sold his employer's wheat which he had persuaded his master's wife to deliver to him,<sup>12</sup> provided the owner did not intend to part with the title, so as to make the offense that of obtaining goods by false pretenses.<sup>13</sup>

1 See *Breckenridge v. McAfee*, 54 Ind. 141; *Hoffman v. Carow*, 20 Wend. 21; *Cundy v. Lindsay*, Law R. 3 App. C. 463; 24 Eng. Rep. 345; *Galvin v. Bacon*, 2 Fairf. 30, 31; 25 Am. Dec. 253; note to *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604, 606.

2 *Parham v. Riley*, 4 Cold. 9. It is well known to be the general rule that a thief acquires no title to the stolen property and that he can pass none: *Barstow v. Savage Mining Co.* 64 Cal. 388; 49 Am. Rep. 705.

3 See "Conversion by Purchase," 15 Am. Law Rev. 363, 366; 2 *Schouler on Personal Property*, § 18.

4 *Sharp v. Parks*, 48 Ill. 511.

5 *Barrett v. Warren*, 3 Hill, 348. See "Conversion by Purchase," 15 Am. Law Rev. 363, 366, 377.

6 *Gilmore v. Newton*, 9 Allen, 171.

7 See *Lee v. Bayes*, 13 Com. B. 599; "Conversion by Purchase," 15 Am. Law Rev. 363, 366; 2 *Schouler on Personal Property*, § 19. *Bona fide* purchaser of stolen mining stock: *Barstow v. Savage Mining Co.* 64 Cal. 388; 49 Am. Rep. 705. Property given in exchange for stolen goods not recoverable from *bona fide* purchaser: *Sadler v. Lewers*, 42 Ark. 148.

8 *Lee v. Bayes*, 13 Com. B. 599.

9 *Robinson v. Shipworth*, 23 Ind. 311.

10 *Galvin v. Bacon*, 2 Fairf. 30, 31; 25 Am. Dec. 258.

11 *Barstow v. Savage Mining Co.* 64 Cal. 388; 49 Am. Rep. 705; distinguishing, *Winter v. Belmont Mining Co.* 53 Cal. 428.

12 *Breckenridge v. McAfee*, 54 Ind. 141. What constitutes larceny: See *Mowry v. Walsh*, 8 Cowen, 238.

13 *Florence Sewing Machine Co. v. Warford*, 1 Sweeny, 433; *Williams v. Given*, 6 Gratt. 268. See "Conversion by Purchase," 15 Am. Law Rev. 363, 367, referring further to misleading views in *Andrews v. Dieterich*, 14 Wend. 34, and *Mowry v. Walsh*, 8 Cowen, 238, and to correct rulings in *Malcolm v. Loveridge*, 13 Barb. 372; *Keyser v. Harbeck*, 3 Duer, 373.

§ 177. *Liability of agent or bailee. — Sale by auctioneer or broker.* Even the auctioneer who receives and sells stolen goods, and delivers the proceeds to the thief, is liable in trover to the true owner<sup>1</sup> without demand, although such auctioneer did not know or have reason to suspect that the goods were stolen;<sup>2</sup> and the same is true of the broker who sells on commission stolen stocks brought to him by a stranger.<sup>3</sup>

*Transfer by agent or bailee.* So if the bailee of stolen goods sells them, though in good faith, he cannot escape liability to the true owner for their value.<sup>4</sup> But there is no such liability in the case of stolen negotiable instruments like interest coupons of United States bonds, on the part of one who in good faith and without gross negligence received them as an agent for exchange from a party to the theft, and on transferring them by delivery paid the proceeds to his employer, without benefit to himself and without demand or notice.<sup>5</sup>

*Return to depositary.* And there is no liability in conversion to the owner on the part of a mere naked bailee who voluntarily returns stolen property to the depositor, as an innkeeper who thus redelivers a horse which he knew to have been stolen.<sup>6</sup>

1 See *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180, 185; quoting, *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216.

2 *Hoffman v. Carow*, 20 Wend. 21; 22 Wend. 285. And see 2 Schouler on Personal Property, § 19; 1 Corbin's Benjamin on Sales, § 6, n. 2; citing, also, *Knapp v. Hobbs*, 50 N. H. 476; *Dudley v. Hawley*, 40 Barb. 397; *Cobb v. Dows*, 10 N. Y. 335; *Sharp v. Parks*, 48 Ill. 511; Story on Agency, § 312.

3 *Bercich v. Marye*, 9 Nev. 312.

4 *Kramer v. Faulkner*, 9 Mo. App. 34; following, *Koch v. Branch*, 44 Mo. 542.

5 *Spooner v. Holmes*, 102 Mass. 503; as stated, Bennett's Benjamin on Sales, § 6, n. b. Compare *Winter v. Belmont Mining Co.* 53 Cal. 428; distinguished in *Barstow v. Savage Mining Co.* 64 Cal. 388; 49 Am. Rep. 705.

6 *Loring v. Mulcahy*, 3 Allen, 575; stated, Bennett's Benjamin on Sales, § 6, n. b.; which also cites on subjects of section, *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171; *Hills v. Snell*, 104 Mass. 177; 6 Am. Rep. 216; *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604; *Courtis v. Cane*, 32 Vt. 232; 76 Am. Dec. 174; *Pease v. Smith*, 61 N. Y. 477. And consult 1 Corbin's Benjamin on Sales, § 6, n. 2; citing, further, on depositary's return of stolen goods to depositor, *Hill v. Hays*, 38 Conn. 532; *Dudley v. Hawley*, 40 Barb. 397.

‡ 178. **Markets overt.**—*Nature.* The ancient exception, which still subsists in England, to the rule that no purchaser, however innocent, can obtain title to stolen goods, related to transfers in markets overt,<sup>1</sup> which comprised those open markets or fairs where the

owner was supposed to have the amplest opportunity to make pursuit of his property, and prevent its sale.<sup>2</sup>

*Place of operation.* Custom sanctioned their establishment in the country at designated spots, and their operation there on particular days;<sup>3</sup> while within the ancient limits of London,<sup>4</sup> now comprising the business quarter called the city,<sup>5</sup> their protective function was extended on every week-day to every shop in this region, for its special class of goods.<sup>6</sup>

*Requisite of good faith.* Wherever situated, the market was, and still is, required to be open, public, and legally constituted,<sup>7</sup> while the time, place, and manner of sale were subject to special regulations, mainly to insure good faith;<sup>8</sup> though this would ordinarily be presumed from the character of these markets, where those who had lost property, by theft or otherwise, could be present and make known their loss, while every assurance of good faith was given by the publicity of the transaction.<sup>9</sup>

1 See 2 Blackst. Com. 449; 2 Bouvler Law Dict. (14th ed.) 105; 2 Schouler on Personal Property, § 19; Hilliard on Sales (1st ed.), 23; Fawcett v. Osborn, 32 Ill. 425; 83 Am. Dec. 278, 283; Cundy v. Lindsay, Law R. 3 App. C. 463; 24 Eng. Rep. 345. Innocent sale of stolen cattle for thief by public salesmaster: Delaney v. Wallis, 14 Law R. Ir. 31; noted, 32 Week. R. Dig. 213.

2 Crane v. London Dock Co. 33 Law J. Q. B. 224; "Conversion by Purchase," 15 Am. Law Rev. 363, 368; note to Williams v. Merle, 25 Am. Dec. 607.

3 Benjamin v. Andrews, 5 Com. B. N. S. 299; 27 Law J. M. C. 310.

4 Anon. 12 Mod. 521.

5 See Lee v. Bayes, 18 Com. B. 599, 601.

6 See 2 Blackst. Com. 449; 2 Bouvler Law. Dict. (14th ed.) 105; "Conversion by Purchase," 15 Am. Law. Rev. 363, 368; Story on Sales, § 190; Bennett's Benjamin on Sales, § 6; and 1 Corbin's Benjamin on Sales, § 8; citing, Case of Market Overt, 5 The Reporter, 83 b; L'Evesque de Worcester's Case, Moore, 360; Poph. 84; Comyn's Dig. Market, E.; Lyons v. De Pass, 11 Ad. & E. 326; Crane v. The London Dock Co. 5 Best & Smith, 313; 33 Law J. Q. B. 224. And consult Campbell on Sales, 55; 2 Schouler on Personal Property, § 19; note to Williams v. Merle, 25 Am. Dec. 607.

7 Lee v. Bayes, 18 Com. B. 599; Benjamin v. Andrews, 5 Com. B. N. S. 299; 27 Law J. M. C. 310.

8 See *Crane v. London Dock Co.* 5 Best & Smith, 313; 33 Law J. Q. B. 224; "Conversion by Purchase," 15 Am. Law Rev. 363, 368; 2 Blackst. Com. 450; 2 Bouvier Law Dict. (14th ed.) 105; note to *Williams v. Merle*, 25 Am. Dec. 608.

9 *Fawcett v. Osborn*, 32 Ill. 411, 426; 83 Am. Dec. 278, 283.

‡ 179. **Extent of exemption.**—*Restrictions on protection.* The unassailable title acquired by a purchaser of stolen goods in market overt in England does not cover<sup>1</sup> sales by sample,<sup>2</sup> nor probably sales to a shopkeeper dealing in the kind of goods bought by him, though made within the precincts of the city of London,<sup>3</sup> nor sales at auction in a horse repository outside such ancient limits.<sup>4</sup>

*Transfers pending conviction.* And the validity of titles thus acquired was affected and apparently endangered by enactments, providing that upon the conviction of the thief the restoration of the goods to the owner should be ordered.<sup>5</sup> But these enactments were construed, not as invalidating all transfers by others than the owner, but as impliedly requiring the conviction of the thief before a civil action could be maintained.<sup>6</sup> Hence, the *bona fide* purchaser in market overt was protected until such conviction, and could meanwhile dispose of the goods, even after notice of the robbery.<sup>7</sup> The basis of this view was that pending the prosecution the title was suspended,<sup>8</sup> and that the owner did not become re-invested therewith until the conviction of the offender.<sup>9</sup>

*Liability of seller and of purchaser out of market overt.* The privilege of market overt does not extend protection, however, to the innocent seller as well as the purchaser of goods;<sup>10</sup> nor is there a similar exemption from liability on the part of an innocent purchaser, not in market overt, before the prosecution of the thief,<sup>11</sup> as the asserted doctrine that a civil action was not maintainable until the prosecution of the offender has been

held inapplicable where the action was against a third party.<sup>12</sup>

1 According to Bennett's Benjamin on Sales, and 1 Corbin's Benjamin on Sales, §§ 10, 14. And see note to Williams v. Merle, 25 Am. Dec. 608.

2 Hill v. Smith, 4 Taunt. 532; approved in Crane v. London Dock Co. Law J. 33 Q. B. 224; 5 Best & Smith, 313. And see Story on Sales, § 191; Bailiffs etc. v. Ditson, 6 East, 438; Town Commrs. v. Woods, 1 R. 11 C. L. 506

3 See Crane v. London Dock Co. 5 Best & Smith, 313; questioning counter-ruling in Lyons v. De Pass, 11 Ad. & E. 326.

4 Lee v. Bayes, 18 Com. B. 599. And see on sales of horses in market overt, Joseph v. Adkins, 2 Stark. 76; Browning v. Magill, 2 Har. & J. 303; 2 Blackst. Com. 450.

5 Stats. 21 Hen. 8, ch. 11; 7, 8 Geo. 4, ch. 29, § 57; re-enacted and enlarged by stats. 24, 25 Vict. ch. 96, § 100. Excepting negotiable securities from its operation: See Story on Sales, § 194; Bennett's Benjamin on Sales, § 11; 1 Corbin's Benjamin on Sales, § 11; Campbell on Sales, 56.

6 "Conversion by Purchase," 15 Am. Law Rev. 363, 368.

7 See Horwood v. Smith, 2 Term Rep. 750. Similar views where goods obtained by false pretenses: See Moyce v. Newington, Law R. 4 Q. B. D. 32; Lindsay v. Cundy, Law R. 1 Q. B. D. 347, 357.

8 *Bona fide* purchaser of stolen beasts sold in market overt, held not entitled to counter-claim on action by original owner, for cost of their keep between such sale and the conviction of the thief: Walker v. Matthews, Law R. 8 Q. B. D. 103; same case with note in 21 Am. Law Reg.

9 "Conversion by Purchase," 15 Am. Law Rev. 363, 368. It has been held that the title then becomes re-invested although no writ or order of restitution has been made by the court: Scattergood v. Sylvester, 15 Q. B. 506; Law J. 19 Q. B. 447; Bennett's Benjamin on Sales, § 11, n. 2; referring, also, to Peer v. Humphrey, 2 Ad. & E. 495; Queen v. Horan, 1 R. 6 C. L. 293; Reg. v. Stancliffe, 11 Cox C. C. 318.

10 Ganley v. Ledwidge, 1 R. 10 C. L. 33; stated, Bennett's Benjamin on Sales, § 8 a; 1 Corbin's Benjamin on Sales, § 8.

11 See citations in next note.

12 White v. Spettigue, 13 Mees. & W. 603. Relying upon Stone v. Marsh, 6 Barn. & C. 551; Marsh v. Keating, 1 Bing. N. C. 198. Overruling Gimson v. Woodfall, 2 Car. & P. 41; Peer v. Humphreys, 2 Ad. & E. 495; 4 Nev. & M. 430. Confirmed, Lee v. Bayes, 18 Com. B. 599. See Bennett's Benjamin on Sales, and 1 Corbin's Benjamin on Sales, § 13; stating, also, Wells v. Abraham, Law R. 7 Q. B. 554, and Ex parte Ball, Law R. 10 Ch. D. 667; and referring, also, to Midland Ins. Co. v. Smith, Law R. 6 Q. B. D. 561, where all the cases are reviewed. Consult further, Campbell on Sales, 57; Story on Sales, § 195; "Conversion by Purchase," 15 Am. Law Rev. 363, 369.

§ 180. Not recognized in this country.—*Extent of repudiation.*—The Saxon institution of markets overt has never been in vogue in this country, and its existence and effect have been expressly repudiated in various

States.<sup>1</sup> It has failed of recognition<sup>2</sup> in Maine,<sup>3</sup> Vermont,<sup>4</sup> New Hampshire,<sup>5</sup> Massachusetts,<sup>6</sup> New York,<sup>7</sup> Pennsylvania,<sup>8</sup> Maryland,<sup>9</sup> North Carolina,<sup>10</sup> Mississippi,<sup>11</sup> Tennessee,<sup>12</sup> Ohio,<sup>13</sup> Illinois,<sup>14</sup> and Indiana.<sup>15</sup>

*Sales under execution.* Many efforts have been made to have the courts declare the doctrine of sales in market overt applicable to sales of chattels under execution;<sup>16</sup> but it is said that with unvarying unanimity the rule has been sustained that a sale of chattels, under a writ against one person, can have no operation upon the title of another person, and that the purchaser is always liable to a suit by the true owner.<sup>17</sup> Yet there are decisions of an apparently opposite tendency as to judicial sales, etc.<sup>18</sup>

1 See 2 Kent Com. (12th ed.) 325; 2 Schouler on Personal Property, § 10; Ventress v. Smith, 10 Peters. 161; "Conversion by Purchase," 15 Am. Law Rev. 363, 369; Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 283; note to Williams v. Merle, 25 Am. Dec. 603.

2 According to Bennett's Benjamin on Sales, § 7 n. f; 2 Schouler on Personal Property, § 19, n. 2, p. 21. And see 1 Corbin's Benjamin on Sales, § 8, n. 5; Story on Sales, § 190, n. 3; 2 Bouvier Law Dict. (14th ed.) 105.

3 Coombs v. Gorden, 59 Me. 112.

4 Heacock v. Walker, 1 Tyler, 341; Griffith v. Fowler, 18 Vt. 330.

5 Bryant v. Whitchee, 52 N. H. 158.

6 Dame v. Baldwin, 8 Mass. 521; Towne v. Collins, 14 Mass. 500.

7 Wheelwright v. Depeyster, 1 Johns. 180; 8 Am. Dec. 345; Hoffman v. Carow, 22 Wend. 285, S. C. 20 Wend. 21; Mowrey v. Walsh, 8 Cowen, 238.

8 Easton v. Worthington, 5 Serg. & R. 130; Hosack v. Weaver, 1 Yeates, 478; Hardy v. Metzgar, 2 Yeates, 347; Quinn v. Davis, 73 Pa. St. 15.

9 Browning v. Magill, 4 Har. & J. 308.

10 Black v. Jones, 64 N. C. 318.

11 Ketchum v. Brennan, 53 Miss. 506.

12 Dawson v. Susong, 1 Heisk. 243.

13 Roland v. Gundy, 5 Ohio, 203.

14 See Fawcett v. Osborn, 32 Ill. 411; 83 Am. Dec. 278, 283.

15 See Robinson v. Skipworth, 23 Ind. 311.

16 See citations in next note. Transfer of title by sheriff's sale: See note to Williams v. Merle, 25 Am. Dec. 610.

17 Freeman on Executions, § 335; citing, McClanahan v. Barrow, 27 Minn. 664; Chambers v. Lewis, 28 N. Y. 454; Farrant v. Thompson, 5 Barn. & Ald. 826; Buffum v. Deane, 8 Cush. 41; Shaw v. Tumbidge,

2 Black. W. 1064; Stone v. Ebberly, 1 Bay, 317; Champney v. Smith, 15 Gray, 212; Sheanck v. Huber, 6 Binn. 2; Symonds v. Hull, 37 Me. 351; Austin v. Tilden, 14 Vt. 327; Homesley v. Hague, 4 Jones, 481; Williams v. Miller, 16 Conn. 144; Bartholomew v. Warren, 32 Conn. 202.

18 See Samms v. Alexander, 3 Yeates, 268; Forsythe v. Ellis, 4 Marsh. J. J. 298; The Monte Allegre, 9 Wheat. 616; Heacock v. Walker, 1 Tyler, 341; Story on Sales, § 199, n.

§ 181. *Lost chattels.*—*No title in purchaser.* If the purchaser of a chattel does not buy it in market overt,<sup>1</sup> and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner,<sup>2</sup> any more than if it turned out that the chattel had been stolen by such person.<sup>3</sup>

*Certificates of stock.* And the principle that the finder of goods holds them in subordination to the owner's rights, and has no title to confer upon a *bona fide* buyer,<sup>4</sup> has been applied to the case of lost certificates of stock in a mining corporation indorsed by the owner, so as to hold that a *bona fide* purchaser acquires no title where the shares are transferable on the books of the company by indorsement and surrender of the certificate.<sup>5</sup>

1 See preceding sections of book relating to markets overt.

2 Cundy v. Lindsay, Law R. 3 App. C. 463; 24 Eng. Rep. 345. Rights of finder of lost chattels: 2 Schouler on Personal Property, § 14; citing, Bridges v. Hawkesworth, 7 Eng. Law & Eq. 424; 15 Jur. 1029; McAvoy v. Medina, 11 Allen, 548; 2 Kent Com. 356.

3 Cundy v. Lindsay, Law R. 3 App. C. 463; 24 Eng. Rep. 345. Estrays etc., and their ownership: 2 Schouler on Personal Property, § 17. *Bona fide* purchaser of strayed cattle not protected: Mann v. Ark. etc. Co. 24 Fed. Rep. 261.

4 "Conversion by Purchase," 15 Am. Law Rev. 363, 375.

5 Sherwood v. Meadow Valley Mining Co. 50 Cal. 412. Compare as to stolen certificates, Barstow v. Savage Mining Co. 64 Cal. 388; 49 Am. Rep. 705; distinguishing, Winter v. Belmont Mining Co. 53 Cal. 428. Lost negotiable instruments in general: 2 Schouler on Personal Property, § 16.

§ 182. *Sales by trespassers.*—*Chattels obtained by robbery.* Where chattels are obtained by robbery instead of larceny, their transfer can confer no title upon any subsequent purchaser.<sup>1</sup>

*Severed objects.* The same rule applies to any seizure by force or without right;<sup>2</sup> and thence arises the liability in trover or like remedy of *bona fide* purchasers claiming through a sale by trespassers of severed earth,<sup>3</sup> logs,<sup>4</sup> wood,<sup>5</sup> timber,<sup>6</sup> wild berries,<sup>7</sup> and posts used to fence the line of a railroad.<sup>8</sup> Thus, the owner of timber cut upon his land by a trespasser may recover it in an action for the specific property, although it has been converted by the trespasser into railroad ties, and sold to a *bona fide* purchaser.<sup>9</sup>

*Mistake.* And it is immaterial in regard to the invalidity of sales by trespassers, and the want of title of *bona fide* purchasers, that the property was taken by mistake, as in the case of potash thus removed from a warehouse,<sup>10</sup> or of a gold coin of private issue passed for less than its value.<sup>11</sup>

1 See *Parham v. Riley*, 4 Cold. 9; "Conversion by Purchase," 15 Am. Law Rev. 363, 369.

2 See citations in succeeding notes.

3 *Riley v. Boston Water Power Co.* 11 Cush. 11.

4 *Nesbitt v. St. Paul Lumber Co.* 21 Minn. 491.

5 *Whitman Gold etc. Mining v. Tritle*, 4 Nev. 494.

6 *Strubbee v. Trustees*, 78 Ky. 481.

7 *Freeman v. Underwood*, 66 Me. 229.

8 *St. Louis etc. R. Co. v. Haulbrunner*, 59 Ill. 152. See "Conversion by Purchase," 15 Am. Law Rev. 363, 369, giving nearly all these illustrations.

9 *Strubbee v. Trustees*, 78 Ky. 481.

10 *Williams v. Merle*, 11 Wend. 80; 25 Am. Dec. 604.

11 *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739. See "Conversion by Purchase," 15 Am. Law Rev. 363, 370.

‡ 183. *Illegal levy and sale.*—*Officer's levy on stranger's goods.* Where an officer makes an illegal levy upon the goods of a stranger to the process,<sup>1</sup> he has no title to transfer.<sup>2</sup>

*Execution against wrong person.* Hence, a purchaser acquires no title to personal property which he buys at sheriff's sale,<sup>3</sup> unless it belongs to the judgment



debtor;<sup>4</sup> and a purchaser of the goods of one person on execution against another, is liable to the real owner in trover,<sup>5</sup> where such buyer takes the goods into his custody.<sup>6</sup>

*Exempt property.* The same doctrine applies to a forced sale of goods exempt from seizure by creditors.<sup>7</sup> But it has been held that the private purchaser of goods exempt from execution obtains a title unaffected by subsequent admissions or acts of the debtor, and which overrides the lien of any subsequent attachment levy, and indeed of any previous levy unless it be for unpaid purchase money.<sup>8</sup>

*Void sales, etc.* The purchaser, however remote, gains no title, but is liable in conversion where he claims through a sale by an administrator under a void order of court,<sup>9</sup> and the same doctrine has been applied to a sale of a vessel, void for want of notice to some of the part owners,<sup>10</sup> or of captured coffee sold before the regular condemnation of the prize.<sup>11</sup> But there is a distinction made where there is mere irregularity in the proceedings, and the process is not void,<sup>12</sup> but voidable.<sup>13</sup>

1 See *Griffith v. Fowler*, 18 Vt. 390; "Conversion by Purchase," 15 Am. Law Rev. 363, 369. Persons selling under process of law in England: See *Campbell on Sales*, 71, et seq.

2 See authorities cited in next paragraph. Liability of sheriff for taking goods of stranger to the process: 2 *Greenleaf on Evidence*, § 537.

3 Sheriff in general: 2 *Bouvier Law Dict.* (14th ed.) 518. Sheriffs' sales in England: *Campbell on Sales*, 72.

4 See citations in succeeding notes.

5 According to *Bennett's Benjamin on Sales*, § 17, n. p, citing authorities next given.

6 *Symonds v. Hall*, 37 Me. 354, 357, 358; *Coombs v. Gorden*, 59 Me. 111; *Griffith v. Fowler*, 18 Vt. 390; *Sanborn v. Kittridge*, 20 Vt. 640; *Bryant v. Whitchee*, 32 N. H. 158; *Buffum v. Deane*, 8 Cush. 41; *Champney v. Smith*, 15 Gray, 512; *Johnson v. Babcock*, 8 Allen, 583; *Williams v. Miller*, 16 Conn. 144; *Bartholomew v. Warren*, 32 Conn. 102; *Sheanck v. Huber*, 6 Binn. 2; *Homesley v. Hogue*, 4 Jones (N. C.) 481; *Stone v. Elberly*, 1 Bay, 317; *Arendale v. Morgan*, 5 Sneed, 703; *Baggs v. Fowler*, 16 Cal. 559; *Burke v. McWhirter*, 35 Up. Can. Q. B. 1; *Kirby v. Cahill*, 6 Up. Can. Q. B. (O. S.) 510.

7 See *Cooper v. Newman*, 45 N. H. 339; "Conversion by Purchase," 15 Am. Law Rev. 363, 369. And consult *Williams v. Miller*, 16 Conn. 143.

8 *Buckley v. Wheeler*, 52 Mich. 1.

9 *Wells v. Raglan*, 1 Swan, 501. So in the case of property donated by the decedent: *Harris v. Saunders*, 1 Strob. Eq. 500.

10 *Miller v. Thompson*, 60 Me. 322.

11 *Wheelwright v. Depeyster*, 1 Johns. 471; 3 Am. Dec. 345. See "Conversion by Purchase," 15 Am. Law Rev. 363, 375, 376, giving these illustrations.

12 Process in general: 2 Bouvier Law Dict. (14th ed.) 379.

13 See *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Lock v. Selwood*, 1 Q. B. 736.

‡ 184. **Unauthorized sales by bailees.**—*In general.* A bailee intrusted with personal property has no absolute title thereto which he can transfer,<sup>1</sup> and his sale without authority or in material excess of that given is a conversion,<sup>2</sup> which can confer no rights of ownership even upon a *bona fide* purchaser.<sup>3</sup>

*In various kinds of bailment.* Such is the case whether the bailment be for use,<sup>4</sup> for hire,<sup>5</sup> for loan,<sup>6</sup> for custody,<sup>7</sup> for transportation,<sup>8</sup> or for the performance of work upon the object intrusted.<sup>9</sup>

*Bailment with privilege of purchase.* Even where the bailee has the privilege of purchasing,<sup>10</sup> it has generally been considered that such option to purchase does not, before it has been exercised, give him any greater power to dispose of the goods than an ordinary bailee;<sup>11</sup> and this principle applies to a sale by the hirer of a billiard table detained by the purchaser after demand so as to constitute a conversion,<sup>12</sup> or of a yoke of cattle delivered to use and return, with privilege to pay for and keep, which the owner could follow and peaceably retake.<sup>13</sup>

1 See *Galvin v. Bacon*, 2 Fairf. 23, 31; 25 Am. Dec. 258.

2 See "Conversion by Purchase," 15 Am. Law Rev. 363, 371. Sales and pledges by bailees and agents: See note to *Williams v. Merle*, 25 Am. Dec. 615.

3 See *Galvin v. Bacon*, 2 Fairf. 23, 31; 25 Am. Dec. 258; *Mayes v. Bruton*, 1 Tex. App. (Civ. Cas.) ‡ 699. Bailment of jewelry: *Smith v. Clews*, 33 Hun, 501; *Levi v. Booth*, 58 Me. 305; 42 Am. Rep. 332.

4 *Gilmore v. Newton*, 9 Allen, 171; *Riford v. Montgomery*, 7 Vt. 411.

5 *Donald v. Arnold*, 28 Tex. 97; *Sanborn v. Colman*, 6 N. H. 14. When no larceny in such a case: *Morrison v. State*, 4 Tex. Law Rev. 289.

6 *Roland v. Gundy*, 5 Ohio, 202; *Heacock v. Walker*, 1 Tyler, 338.

7 *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Hartop v. Hoare*, 3 Atk. 44; *Newcomb-Buchanan Co. v. Baskett*, 11 Bush, 658.

8 *Covill v. Hill*, 4 Denio, 323; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 503; *Linnen v. Crugger*, 40 Barb. 633; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541.

9 *Wooster v. Sherwood*, 25 N. Y. 278; *Buckmaster v. Mower*, 21 Vt. 204. See "Conversion by Purchase," 15 Am. Law Rev. 363, 371, giving these illustrations.

10 See *Carter v. Wallace*, 35 Hun, 189. Lease with title reserved: *Puffer v. Reeve*, 35 Hun, 480; 15 Abb. N. C. 388.

11 See citations in succeeding notes.

12 *Burroughs v. Bayne*, 5 Hurl. & N. 296. Compare *Sargent v. Gile*, 8 N. H. 325.

13 *Chamberlain v. Smith*, 44 Pa. St. 431; "Conversion by Purchase," 15 Am. Law Rev. 363, 371; referring, also, to *Grant v. King*, 14 Vt. 367; *Hart v. Carpenter*, 24 Conn. 427.

§ 185. **Transfers of unforfeited pledges.**—*Sale without restriction.* In the case of a pledge, the holder thereof is considered to have an assignable interest;<sup>1</sup> but a sale by the pledgee without restriction, before maturity of the debt, is generally regarded as a conversion, and as conveying no title to any purchaser.<sup>2</sup>

*Repledge for greater amount.* It has, however, recently been decided in England,<sup>3</sup> and sustained by the Supreme Court of the United States,<sup>4</sup> that a repledge for a greater amount than the original debt, before maturity, would not justify a recovery in conversion against the repledgee, without a previous tender of the original debt,<sup>5</sup> and an outright purchaser would presumably stand on even a better footing than the repledgee.<sup>6</sup> The ground of this view seems to be found in the statement that although the pledgee cannot confer upon a third person a better title or greater interest than he possesses, yet if, nevertheless, he does pledge the goods to a third person for a greater interest than

he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor;<sup>7</sup> but the transfer is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage he may have sustained by reason of the act of the pawnee in repledging the goods.<sup>8</sup>

1 *Bailey v. Colby*, 34 N. H. 21. See 1 Schouler on Personal Property, § 403; citing, Story on Bailments, §§ 322, 324; 2 Kent Com. 579; Schouler on Bailments, 201; *Whitaker v. Sumner*, 20 Pick. 339; *Moses v. Conham*, Owen, 123; *Shelton v. French*, 33 Conn. 489.

2 *Bailey v. Colby*, 34 N. H. 29. And see *McNeil v. Tenth Nat. Bank*, 55 Barb. 59; "Conversion by Purchase," 15 Am. Law Rev. 363, 372; 1 Schouler on Personal Property, § 403; citing cases given in last note, and referring, also, to *Belden v. Perkins*, 78 Ill. 449; *Ashton's Appeal*, 73 Pa. St. 153. Consult, also, note to *Williams v. Merle*, 25 Am. Dec. 615.

3 *Donald v. Suckling*, Law R. 1 Q. B. 585; *Bigelow's Leading Cases on Torts*, 394; *Halliday v. Holgate*, Law R. 3 Ex. 299.

4 *Talty v. Freedman's Sav. Bank*, 93 U. S. 321.

5 See statements of cases just cited in article on "Conversion by Purchase," 15 Am. Law Rev. 363, 372.

6 See query in *Talty v. Freedman's Bank*, 93 U. S. 321.

7 *Donald v. Suckling*, Law R. 1 Q. B. 585; *Bigelow's Leading Cases on Torts*, 394.

8 *Donald v. Suckling*, Law R. 1 Q. B. 585; *Bigelow's Leading Cases on Torts*, 394; quoted in article on "Conversion by Purchase," 15 Am. Law Rev. 363, 372, 373. The doctrine stated is said to be the declared American rule in various instances: 1 Schouler on Personal Property, § 404; citing, *Lewis v. Mott*, 56 N. Y. 395; *Belden v. Perkins*, 78 Ill. 449; Schouler on Bailments, 202; *First Nat. Bank v. Boyce*, 78 Ky. 42.

‡ 186. Sales of forfeited pledges. — *Mode of making.* If the pledgor fails to make payment at the time agreed therefor, the pledgee may, aside from his personal remedy upon the debt, legally sell the goods pledged to him, and convey a valid title thereto,<sup>1</sup> either at a judicial sale upon foreclosure of the pledge,<sup>2</sup> or by a sale without the supervision of the courts,<sup>3</sup> in a public manner, after notice,<sup>4</sup> in the mode prescribed by the general law,<sup>5</sup> or by local statute,<sup>6</sup> or by the special agreement of the parties.<sup>7</sup>

*Irregularity in.* But it is the latest American doctrine that the pledgee cannot treat a sale which is made without any or sufficient notice, or is otherwise irregular or informal, as in itself a conversion of the pledged property;<sup>8</sup> but that as a prerequisite to suing either the pledgee or a third person to whom the pledgee may have transferred the property,<sup>9</sup> he must tender the amount that he owes,<sup>10</sup> or at any rate, that whatever the ground of illegality, the pledgor can only recover damages over and above the amount of indebtedness on his part.<sup>11</sup>

1 See *Martin v. Reil*, 11 Com. B. N. S. 730; *Johnson v. Stear*, 15 Com. B. N. S. 350; *Pigott v. Cubley*, 15 Com. B. N. S. 701.

2 See citations in succeeding notes.

3 See 2 Bouvier Law Dict. (14th ed.) 341.

4 See 2 Kent Com. 582; Story on Bailments, § 210; 1 Schouler on Personal Property, § 407; referring, also, to *Kemp v. Westbrook*, 1 Ves. 278; *Tucker v. Wilson*, 1 P. Wms. 261; *Washburn v. Pond*, 2 Allen, 474; *Elder v. Rouse*, 15 Wend. 218; *Davis v. Funk*, 20 Pa. St. 243.

5 See 2 Bouvier Law Dict. (14th ed.) 341.

6 See Mass. Pub. Stats. ch. 192, §§ 10, 12; Schouler on Bailments, 222; Cal. Civ. Code, §§ 3005, 3011.

7 1 Schouler on Personal Property, § 408; citing, *Robinson v. Hurley*, 11 Iowa, 410; *Mowry v. Wood*, 12 Wis. 413; *Stevens v. Bell*, 6 Mass. 339; *Rohrle v. Stidger*, 50 Cal. 207.

8 See citations in succeeding notes.

9 See preceding section of book.

10 Tender in general: 2 Bouvier Law Dict. (14th ed.) 581.

11 1 Schouler on Personal Property, § 407, p. 484, n. 3; referring to *Halliday v. Holgate*, Law R. 3 Ex. 299; *Baltimore Mar. Ins. Co. v. Dalrymple*, 25 Md. 142; *Lewis v. Mott*, 36 N. Y. 395; *Bulkeley v. Welch*, 31 Conn. 339; *Kidney v. Persons*, 41 Vt. 386; Schouler on Bailments, 209, 210, and cases cited; *Talty v. Freedman's Savings Co.* 93 U. S. 321.

§ 187. *Delivery of goods for sale.—Disposal by bailee or agent.* Where goods are intrusted for sale to a bailee or agent,<sup>1</sup> his disposal of them for his own use instead of that of the party who delivered them to him, is a conversion which invalidates the title of the purchaser;<sup>2</sup> as where an article of personal property is delivered to another to sell for the owner, and the bailee turns it

over to his creditor in payment of his own pre-existing debt.<sup>3</sup>

*Departure from orders.* And the general rule that a material surpassing of authority is a conversion, applies where there is a substantial departure from orders, as where an exchange of the goods is made instead of a sale;<sup>4</sup> but not where there is merely a sale at prices below those authorized.<sup>5</sup>

1 Goods in possession of agent or bailee: *Glass v. Gelvin*, 80 Mo. 297.

2 See article on "Conversion by Purchase," 15 Am. Law Rev. 263, 373.

3 *Parsons v. Webb*, 8 Greenl. 33; *Rodick v. Coburn*, 68 Me. 170.

4 *Haas v. Damon*, 9 Iowa, 539. Exchange by agent authorized to sell: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

5 *Sargent v. Blunt*, 16 Johns. 74. See "Conversion by Purchase," 15 Am. Law Rev. 363, 373. Sale in excess of instructions as giving good title to *bona fide* purchaser: *Arnold v. Halenbake*, 5 Wend. 34; as cited in note to *Williams v. Merle*, 25 Am. Dec. 615.

§ 188. **Transfer by factor.**—*Pledge.* A factor or commission merchant has an assignable lien<sup>1</sup> on his principal's goods for advances made;<sup>2</sup> but if he pledge them<sup>3</sup> beyond this for his own use,<sup>4</sup> he has generally been deemed guilty of a conversion.<sup>5</sup> And the pledgee has been held to acquire no title to the goods in such a case, even against a subsequent *bona fide* purchaser from the factor.<sup>6</sup>

*Exchange.* So a factor having a general authority to sell his principal's goods, has no authority to exchange them for others, and if he does so, his authority as factor ceases, and he becomes liable to account for their value to his principal.<sup>7</sup>

*Factors' acts, etc.* But the rigor of the rule adverse to effectual pledges by factors has been modified both in England and in many parts of America by the passage of factors' acts,<sup>8</sup> which usually provide for the protection of *bona fide* transferees, especially where they are intrusted with such documents of title,<sup>9</sup> or control,

as bills of lading, warehouse receipts, etc.<sup>10</sup> And independently of statute, the rule has been questioned and qualified,<sup>11</sup> and the doctrine of estoppel has been invoked against the owner of goods who confers apparent ownership or authority to sell upon a factor or other person.<sup>12</sup>

1 See *Donald v. Suckling*, Law R. 1 Q. B. 585; *Bigelow's Leading Cases on Torts*, 394.

2 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 373.

3 Pledge by factor of notes and goods as collateral: *St. Louis Bank v. Ross*, 9 Mo. App. 399.

4 Power of sale by agent or factor gives no right to pledge under English or Canadian law: *City Bank v. Barrows*, Law R. 5 App. C. 664; 34 Eng. Rep. 41.

5 Story on Agency, § 113; *Wright v. Solomon*, 19 Cal. 64; 70 Am. Dec. 136; overruling decisions that doctrine confined to technical factor, in *Hutchinson v. Bows*, 6 Cal. 385; *Glidden v. Lucas*, 7 Cal. 16; and *Horr v. Barker*, 11 Cal. 393; 70 Am. Dec. 791. Agent to sell cannot pledge: *McCreary v. Gains*, 55 Tex. 485; 26 Alb. L. J. 57.

6 *Nowell v. Pratt*, 5 Cush. 111. Sale by factor as distinguished from mere broker: *Baunemann v. Quackenbush*, 11 Daly, 529. Purchase from factor; notice of facts to put on inquiry: *McLachlin v. Brett*, 34 Hun, 478.

7 *Wing v. Neal*, 2 Atl. Rep. (Me.) 881.

8 See 2 Kent Com. 628, n. 1; *Smith's Mercantile Law* (Am. ed.), 126, n.; 2 Schouler on Personal Property, § 556, note on p. 568; note to *Williams v. Merle*, 25 Am. Dec. 616. And consult subsequent chapter on that subject.

9 See subsequent chapter on that subject.

10 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 373, 374; section on FACTORS' ACTS IN GENERAL in next chapter.

11 See *Higsons v. Burton*, 23 Law J. Ex. 32; Story on Agency, § 113.

12 See section on APPARENT OWNERSHIP OR AUTHORITY, in chapter on FACTORS' ACTS.

§ 189. *Purchase generally from one lacking title.*—As constituting conversion. A thief, a trespasser, and a converter, all act, not merely without the owner's consent, but in hostility to his authority;<sup>1</sup> hence, these tort-feasors can acquire none of the owner's rights,<sup>2</sup> and can transmit no title to the innocent purchaser, who is liable for conversion because "the very act of taking goods from one who had no right to dispose of them is a conversion."<sup>3</sup> For the unauthorized

appropriation of another's property is, as a rule, sufficient to enable the owner to maintain an action for its conversion.<sup>4</sup> And it is declared that "certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it."<sup>5</sup> So it has been held that one who claimed a right to property under a purchase from a person who had no title or power to sell, was liable for a conversion.<sup>6</sup> In this class of cases no regard is had to the vendee's ignorance of the vendor's want of title, or to the vendee's coming rightfully to the goods as a purchaser without notice, or to the vendor's having the lawful possession of the goods.<sup>7</sup>

*Liability of auctioneer, etc.* Even an auctioneer or broker, who sells property for one who has no title, and passes over the proceeds to his principal, with no knowledge of the defect of title or want of authority,<sup>8</sup> is held liable for its conversion to the real owner.<sup>9</sup> And where a sale of personal property is made by an auctioneer without disclosing the name of the owner, and the property is afterwards claimed by a superior title, it has been held, though not without dissent, that the purchaser may, in an action for money had and received, recover the purchase money of the auctioneer.<sup>10</sup>

1 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 374. And consult *Russell v. Oppenheimer*, 1 Tex. App. (Civ. Cas.) §§ 269-272.

2 See *Galvin v. Bacon*, 11 Me. (2 Fairf.) 28; 25 Am. Dec. 258.

3 *Hurst v. Gwennap*, 2 Stark. 306; *McCombie v. Davis*, 6 East, 540. And see *Baldwin v. Cole*, 6 Mod. 212; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.

4 *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.

5 *McCombie v. Davis*, 6 East, 540. See *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.

6 *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508. And a purchase without notice from one who has no title, and no right or apparent authority to transfer the property, will not be a defense: *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.



7 *Hartop v. Hoare*, 3 Atk. 49. As quoted, *Roberts v. Dillon*, 3 Daly, 50.

8 *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216.

9 *Hills v. Snell*, 104 Mass. 173; 6 Am. Rep. 216. As quoted, *Alexander v. Swackhamer*, 105 Ind. 81; 53 Am. Rep. 180; citing, *Shearer v. Evans*, 89 Ind. 460; *Breckenridge v. McAfee*, 54 Ind. 401; *Curme v. Rauh*, 100 Ind. 247; *Gillmore v. Newton*, 9 Allen, 171; *Grunson v. State*, 89 Ind. 533; 46 Am. Rep. 178.

10 *Seemuller v. Fuchs*, 64 Md. 217; citing, *Hanson v. Roberdeau*, Peake, 163; *Jones v. Littledale*, 6 Ad. & E. 486; *Mills v. Hunt*, 20 Wend. 431; *Franklyn v. Lamond*, 4 Com. B. 637; *Story on Agency*, § 267; *Addison on Contracts*, 642; *Babington on Auctions*, 9 Law Lib. § 185.

§ 190. *State of title governs.*—*Purchase from bankrupt, etc.* The entire controversy in doubtful cases revolves about the title;<sup>1</sup> and whoever takes the property of another without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it in the eye of the law, tortiously, so that his possession is not lawful against the true owner.<sup>2</sup> Hence, where goods are bought of a bankrupt, it would seem that the purchaser is guilty of a conversion, as well as the seller;<sup>3</sup> for the title vests in the assignee from the moment of bankruptcy, and therefore the vendor has no title to convey.<sup>4</sup> So where plate has been pawned by a widow, who had only a life interest in it, the pawnee was held liable in conversion, although he had no notice of the fact.<sup>5</sup>

*Artisan's reservation of title.* Even wheels and axles have been recovered in trover from a *bona fide* purchaser of the wagon, though he bought from the owner of the wagon himself, where the latter had previously delivered the wagon to a bailee, who had it repaired, but exacted that he should retain the wheels and axles furnished, as security for the payment of a note given for the repairs.<sup>6</sup>

*Objects affixed to land.* And where the tenant of one person borrowed some rails from another, and built them into a fence and corn-bin on the land occupied

by the borrower, a third person, who bought this land of the owner without notice of these facts, was held liable in trover to the owner of the rails.<sup>7</sup>

*Animal coming into stranger's possession.* Nor has any escape from such liability been allowed in the case of a *bona fide* purchaser of a horse which had been stolen from the owner, and came into the possession of an officer of the United States army, who did not clearly establish the paramount title of the government by capture or confiscation.<sup>8</sup> Similarly it has been held that the possession and use of a horse which disappeared from the plaintiff, though honestly purchased by the defendants and their vendors, is a violation of the rights of the plaintiff, for which an action of conversion will lie.<sup>9</sup>

*Chronometer not returned by hirer.* And conversely where the plaintiff, a master of a ship, sent his chronometer to the defendants to have it repaired, and the latter recognized it as one which had been hired by them to another master, to be returned at the end of the voyage, or within twelve months, but which had never been returned, it was held that though the plaintiff had purchased the chronometer in good faith of a watchmaker more than two years previously, for a fair price, he could not recover it of the defendants.<sup>10</sup>

1 See *Cundy v. Lindsay*, Law R. 3 App. C. 463; 24 Eng. Rep. 345; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 375.

2 *Galvin v. Bacon*, 11 Me. (2 Fairf.) 23; 25 Am. Dec. 258.

3 See *Stephens v. Elwall*, 4 Maule & S. 259.

4 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 375, giving nearly all succeeding illustrations.

5 *Hoare v. Parker*, 2 Term Rep. 576.

6 *Clark v. Wells*, 45 Vt. 4.

7 *Ogden v. Lucas*, 48 Ill. 492.

8 *Wilson v. Crockett*, 43 Mo. 216.

9 *Dee v. Hyland*, 3 Utah, 308, 314; 3 Pacif. Rep. 338; citing, *Gilmore v. Newton*, 9 Allen, 171; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

10 *Roberts v. Dillon*, 3 Daly, 50; quoting, *Hartop v. Hoare*, 3 Atk. 49.

§ 101. *Demand.* — *Opposing views of necessity of.* Under the strict view of the rule governing transmission of title to personal property, adopted in many of the States,<sup>1</sup> it is the accepted doctrine that where possession is taken under a purchase from one lacking title, an action for conversion is maintainable without previous demand,<sup>2</sup> upon the ground that where the taking is tortious the buyer's possession is unauthorized from the beginning,<sup>3</sup> and no further evidence of the conversion is necessary.<sup>4</sup> This position raises the question why the right of the plaintiff to recover his property should be made to depend upon the good faith of the defendant, when that good faith is no defense against the plaintiff's right of property or possession when a previous demand has to be made.<sup>5</sup> But in the view taken by some of the cases,<sup>6</sup> the *bona fides* of the purchase makes a difference,<sup>7</sup> and it is urged that as the buyer acts in good faith, his possession at least is lawful, particularly where he takes from a bailee who has the lawful possession.<sup>8</sup> Hence, it is argued that only subsequent acts of the purchaser can make him guilty of a conversion, and where there is no such decided dealing with the goods as a sale would effect, it is asked how else the design to convert can be manifested, except by detention after demand, or how it can be otherwise shown that the innocent and lawful possessor has had an opportunity to restore the goods.<sup>9</sup>

*Where demand deemed unnecessary.* Following the asserted weight of English authority, however, a demand appears to be deemed unnecessary in such cases in Massachusetts,<sup>10</sup> Maine,<sup>11</sup> New Hampshire,<sup>12</sup> Vermont,<sup>13</sup> Pennsylvania,<sup>14</sup> Maryland,<sup>15</sup> Georgia,<sup>16</sup> Mississippi,<sup>17</sup> Arkansas,<sup>18</sup> Illinois,<sup>19</sup> Michigan,<sup>20</sup> Wisconsin,<sup>21</sup> California,<sup>22</sup> Nevada,<sup>23</sup> and Oregon.<sup>24</sup>

*Where demand deemed essential.* The opposite view,

holding that a demand is essential in such cases, is maintained in New York,<sup>25</sup> Connecticut,<sup>26</sup> Indiana,<sup>27</sup> Tennessee,<sup>28</sup> and possibly other States.<sup>29</sup>

1 See subsequent portion of section.

2 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 373, 377.

3 See *Galvin v. Bacon*, 11 Me. (1 Fairf.) 28; 25 Am. Dec. 258.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 377. "That is unlawful which is not justified or warranted by law, and of this character may be some acts which are not attended with any moral turpitude;" *Galvin v. Bacon*, 11 Me. (1 Fairf.) 28; 25 Am. Dec. 258; quoted, *Surles v. Sweeney*, 11 Or. 21.

5 *Trudo v. Anderson*, 19 Mich. 369; 81 Am. Dec. 795. As quoted, *Surles v. Sweeney*, 11 Or. 21; citing, *Shoemaker v. Simpson*, 16 Kan. 52; *Ballou v. O'Brien*, 20 Mich. 34; *Prime v. Cobb*, 63 Me. 202; *McNeil v. Arnold*, 17 Ark. 155; *Smith v. McLean*, 24 Iowa, 322; *Newell v. Newell*, 34 Miss. 386; *Clark v. Lewis*, 35 Ill. 423.

6 See subsequent portion of section.

7 See *Surles v. Sweeney*, 11 Or. 21.

8 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 377.

9 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 377. See *Surles v. Sweeney*, 11 Or. 21; citing, *Barrett v. Warren*, 3 Hill, 343; *Tallman v. Turck*, 26 Barb. 167, and referring, also, to *Wood v. Cohen*, 6 Ind. 454.

10 See *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Riley v. Boston Water Power Co.* 11 Cush. 11; *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739; *Gilmore v. Newton*, 9 Allen, 171; *Heckle v. Lurvey*, 101 Mass. 344; *Carter v. Kingman*, 103 Mass. 517.

11 See *Parsons v. Webb*, 8 Greenl. 38; *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 427; *Whipple v. Gilpatrick*, 19 Me. 427; *Freeman v. Underwood*, 66 Me. 229; *Rodick v. Coburn*, 68 Me. 170.

12 See *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Lovejoy v. Jones*, 30 N. H. 164.

13 See *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Courtis v. Cane*, 76 Am. Dec. 174; *Deering v. Austin*, 34 Vt. 330; *Bucklin v. Beal*, 38 Vt. 653.

14 See *Carey v. Bright*, 53 Pa. St. 70. But see *Talmadge v. Scudder*, 33 Pa. St. 517.

15 See *Harker v. Dement*, 9 Gill, 7.

16 See *Robinson v. McDonald*, 2 Ga. 116.

17 See *Johnson v. White*, 21 Miss. 484.

18 See *McNeil v. Arnold*, 17 Ark. 154.

19 See *Gibbs v. Jones*, 46 Ill. 319.

20 See *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

21 See *Oleson v. Merrill*, 20 Wis. 487; *Eldred v. Oconto Co.* 33 Wis. 133. But see *Dunham v. Converse*, 28 Wis. 306.

22 See *Harpending v. Meyers*, 55 Cal. 555.

23 See *Whitman Mining Co. v. Tritle*, 4 Nev. 494; *Ward v. Carson River Wood Co.* 13 Nev. 44.

24 *Surles v. Sweeney*, 11 Or. 21.

25 See *Storm v. Livingston*, 6 Johns. 44; *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 7 Hill, 613; *Millspaugh v. Mitchell*, 8 Barb. 333; *Tallman v. Turck*, 26 Barb. 167; *Twinam v. Swart*, 4 Lans. 263; *Rawley v. Brown*, 18 Hun, 456. *Contra*, *Bates v. Conkling*, 10 Wend. 383. In some of the New York cases, subtle distinctions are made as to the form of action, and especially is a distinction made between a delivery to the purchaser and a taking of the property out of the vendor's possession: *Marshall v. Davis*, 1 Wend. 103; *Nash v. Mosher*, 19 Wend. 431; *Ely v. Ehle*, 3 Comst. 506; *Fuller v. Lewis*, 13 How. Pr. 219.

26 See *Parker v. Middlebrook*, 24 Conn. 207.

27 See *Wood v. Cohen*, 6 Ind. 455; *Sherry v. Picken*, 10 Ind. 375.

28 See *Houston v. Dyche*, Meigs, 76. But see *Wells v. Raglan*, 1 Swan, 501.

29 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 377, 378.

§ 192. **Purchase from one having a voidable or defeasible title.**—*In general.* While the good or bad faith of the buyer is immaterial in the case of a purchase from one utterly lacking title,<sup>1</sup> yet there is a large group of cases embracing instances of purchase from one who has a voidable or defeasible title,<sup>2</sup> where a purchaser in good faith and without notice acquires a good title, and is free from liability for conversion, despite the defective character of his vendor's title.<sup>3</sup> A contract of this character has been spoken of as a *de facto* contract, which the original owner could reduce and set aside, though he will not be allowed to interfere with a title for valuable consideration obtained by some third person while the contract remained unreduced.<sup>4</sup>

*Impeachment for fraud.* The typical illustration of such an impeachable or revocable title is afforded by the case of a fraudulent vendee;<sup>5</sup> but an example thereof is also furnished by a purchase from a fraudulent vendor, as from a trader who sells in contemplation of bankruptcy or insolvency,<sup>6</sup> in which case the transaction is liable to be impeached by the assignees, who if they wish to disaffirm the contract, must demand the goods from the purchaser.<sup>7</sup>

*Infant's voidable contract.* By analogy it would seem that the same principle would apply to the case of a *bona fide* purchaser from an infant, whose sale is merely voidable at his instance.<sup>8</sup>

1 See *Cundy v. Lindsay*, Law R. 3 App. C. 463; 24 Eng. Rep. 345; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180. See section on PURCHASE GENERALLY FROM ONE LACKING TITLE.

2 See *Stevens v. Hyde*, 32 Barb. 180; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607.

3 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 378.

4 *Cundy v. Lindsay*, Law R. 3 App. C. 464; 24 Eng. Rep. 345. Compare *Hallins v. Fowles*, Law R. 7 Eng. & Ir. App. 770.

5 See subsequent section of chapter.

6 *Nixon v. Jenkins*, 2 Black. H. 135; *Jones v. Fort*, 9 Barn. & C. 764.

7 *Jones v. Fort*, 9 Barn. & C. 764. For when the purchase was made the parties were competent to contract, so that the purchaser's possession was lawful, and only upon a failure to deliver could he be made liable for conversion: *Jones v. Fort*, 9 Barn. & C. 764; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 378.

8 See *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 379.

§ 193. **Sale with condition subsequent.**—*Title of innocent purchaser from vendee.*—There are many cases of completed sales where the title passes, subject to defeat either at the seller's or the buyer's option, or on the failure of the purchaser to make payment or give security as agreed.<sup>1</sup> In such instances, the condition subsequent<sup>2</sup> does not affect the present transfer of title,<sup>3</sup> and hence an innocent purchaser from the vendee acquires a valid title, as the breach of the condition by a sale is the subject of other remedies, and the *bona fide* purchaser is not liable for conversion.<sup>4</sup>

*Right of repurchase by original seller.* Thus, where there is a sale with the right of repurchase reserved, the title passes upon the condition that the seller may subsequently regain it if he choose, and this condition imposed on the vendee cannot of course be binding upon a further *bona fide* purchaser, who takes a perfect title, which no action of conversion can shake.<sup>5</sup> It is

sometimes said that such a purchaser takes a better title than his vendor had, because he "cuts off the right of repurchase";<sup>6</sup> but it is probably more accurate to say that such reserved right has disappeared, because extracted from the title by operation of law.<sup>7</sup>

*Revesting of title on default in payment, etc.* Again, the sale may be complete and the title may pass, but by express stipulation or implication from circumstances, it may be provided that the title shall revert in the vendor if payment is not made, or other act done, as agreed.<sup>8</sup> And here also the conclusion would appear to be justified that the condition subsequent, securing the reverting of the title in certain contingencies, cannot affect the title of the innocent purchaser.<sup>9</sup>

*Option to return goods, etc.* The same view of the nature of the stipulation attached to the contract would seem to govern where the sale is consummated, but the buyer has the option to return the goods within a given time,<sup>10</sup> or even where he has the alternative,<sup>11</sup> to pay or return.<sup>12</sup> In these cases the vendee's privilege to have the consideration refunded or the liability canceled, whether it is to be exercised at his will, or if the goods prove unsatisfactory, is the converse of the right of repurchase; but it is equally a condition subsequent, and likewise creates a defeasible title;<sup>13</sup> for the price is paid in advance, and the property passes at once, subject to the right to rescind and return.<sup>14</sup> Hence the validity of the *bona fide* purchaser's title, and the impregnability of his position.<sup>15</sup>

1 See illustrations given later in section.

2 Conditions subsequent in general: See 1 Bouvier's Law Dict. tit. Condition (14th ed.), 313; Winfield's Words and Phrases, 100; quoting, *Chapin v. School District*, 35 N. H. 450; N. & N. W. R. R. Co. v. Jones, 2 Col. 534; *Ludlow v. N. Y. & H. R. Co.* 12 Barb. 442. In sales: See 2 Schouler on Personal Property, § 309.

3 Transfer of title generally: See chapter on that subject.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 379.

- 5 Hills v. Snell, 104 Mass. 173, 177; 6 Am. Rep. 216.
- 6 Bigelow on Torts, 192.
- 7 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 380.
- 8 Lewis v. Palmer, Hill & D. Supp. 68. And see Southwick v. Smith, 29 Me. 228; Chamberlain v. Dickey, 31 Wis. 63.
- 9 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 380.
- 10 Moss v. Sweet, 16 Q. B. 493; 20 Law J. Q. B. 167; Schlesinger v. Stratton, 9 R. I. 578; Ray v. Thompson, 12 Cush. 281; 59 Am. Dec. 187; Hall v. Aetna Manuf Co. 30 Iowa, 215.
- 11 See Hotchkiss v. Higgins, 52 Conn. 205; 52 Am. Rep. 582; discussing cases on sale or return.
- 12 Buswell v. Bicknell, 17 Me. 344; 35 Am. Dec. 262; Perkins v. Douglas, 20 Me. 317; Jameson v. Gregory, 4 Met. (Ky.) 363; Martin v. Adams, 104 Mass. 262; McKinnee v. Bradlee 117 Mass. 321. But it would be otherwise where the title is retained by special agreement: Crocker v. Gullifer, 44 Me. 491; 69 Am. Dec. 118; Porter v. Pettengill, 12 N. H. 299. Bargains of "sale or return": 2 Schouler on Personal Property, § 312; Hotchkiss v. Higgins, 52 Conn. 205; 52 Am. Rep. 582.
- 13 Compare § 192, on PURCHASE FROM ONE HAVING A VOIDABLE OR DEFEASIBLE TITLE.
- 14 See Hunt v. Wyman, 100 Mass. 198.
- 15 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 380.

§ 194. **Sale with condition precedent.** — *Nature of transaction.* As distinguished from the class of cases where the title passes subject to subsequent defeat from breach of condition,<sup>1</sup> the terms of sale may provide that the title shall remain in the vendor until the performance of some condition, as payment, security, and the like.<sup>2</sup> A common illustration is the case of instalment sales,<sup>3</sup> where the bill of sale is not to be given until the final payment is made.<sup>4</sup>

*Position of bona fide purchasers.* In such instances there is a condition precedent to the vesting of the title in the vendee,<sup>5</sup> and his sale before the fulfilment of this condition confers no rights even upon an innocent purchaser.<sup>6</sup> As the law upon the subject of such a transaction between the parties has been recently expressed, where a sale is made and possession delivered to the vendee upon the express condition that the title to the thing is to remain in the vendor until the purchase price be paid, such payment is strictly a con-



dition precedent,<sup>7</sup> and until performance thereof, the sale is incomplete, and the right of property is not vested in the vendee.<sup>8</sup> But in regard to the liabilities of *bona fide* purchasers, it is deemed possible that the remedy of the vendor, who confers upon another an apparent title by a conditional sale, may be restricted to the right to recover the property;<sup>9</sup> and that no one can be held responsible in tort for the conversion of the property, who "merely exercises such dominion over it as is warranted by the authority thus given."<sup>10</sup>

*Difficulties in discrimination.* It is often difficult to distinguish between an agreement for a future sale upon the performance of a condition, and a bailment with the privilege of purchasing,<sup>11</sup> but there is no difference in principle as to the lack of title of a *bona fide* purchaser.<sup>12</sup> The real problem in the domain of sales, however, is in deciding whether there is a subsisting condition precedent, or whether the title has absolutely passed, and this requires the determination of a question of fact, governed by the intention of the parties;<sup>13</sup> but it is not easy to apply such a criterion when there is a pronounced conflict between the apparent purport of an express agreement and the implications arising from conduct.<sup>14</sup>

1 See preceding section of book.

2 See succeeding portions of section.

3 *Ketchum v. Brennan*, 53 Miss. 546.

4 *Sanders v. Keeber*, 23 Ohio St. 630; *Naglee v. Eddy*, 53 Cal. 597. Title does not pass where reserved under agreement, till bill of sale or taking possession: *Wilcox v. Russell*, 136 Mass. 211, 216; citing, *Chase v. Denny*, 130 Mass. 566; *Moody v. Wright*, 13 Met. 17, 52.

5 Condition precedent in general: 1 *Bouvier Law Dict.* tit. Condition (14th ed.), 313; *Winfield's Words etc.*; citing, *Redman v. Aethna Ins. Co.* 49 Wis. 438; *Moore v. Moore*, 47 Barb. 252; *Selden v. Pringle*, 17 Barb. 466; *Ludlow v. N. Y. & H. R. R. Co.* 12 Barb. 442. In sales: 2 *Schouler on Personal Property*, § 285. Sale subject to approval: *Ruhus v. Gates*, 92 Ind. 66. When sale presumed unconditional: *Hunt v. Kellum*, 59 Tex. 535, 537.

6 *Hirschorn v. Canney*, 98 Mass. 149; *Ballard v. Burgett*, 40 N. Y. 314; *Langdell's Cases on Sales*, 730; *Hotchkiss v. Hunt*, 40 Me. 213; *Putnam v. Lamphier*, 36 Cal. 151; *Couse v. Tregent*, 11 Mich. 65;

Griffin v. Pugh, 44 Mo. 326; Clark v. Wells, 45 Vt. 4; Jennings v. Gage, 13 Ill. 610; 56 Am. Dec. 476; Clayton v. Hester, 80 N. C. 275. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 331. Assignee of insolvent is not *bona fide* purchaser: Lentz v. Flint, 53 Mich. 414.

7 Cobb v. Tufts, 2 Tex. App. (Civ. Cas.) § 152. See under chapter on CONDITIONAL SALES.

8 Cobb v. Tufts, 2 Tex. App. (Civ. Cas.) § 152; citing, Heath v. Randall, 4 Cush. 15; Coghill v. Hartford etc. R. R. Co. 3 Gray, 545; Langdell's Cases on Sales, 713; Hotchkiss v. Hunt, 40 Me. 213; Ballard v. Burgett, 40 N. Y. 314; Langdell's Cases on Sales, 730; Parmelee v. Catherwood, 36 Mo. 479; Little v. Page, 44 Mo. 412; Ridgeway v. Kennedy, 52 Mo. 24.

9 Alexander v. Swackhamer, 105 Ind. 81; 55 Am. Rep. 180.

10 Alexander v. Swackhamer, 105 Ind. 81; 55 Am. Rep. 180; citing, Hills v. Snell, 104 Mass. 173; 6 Am. Rep. 216; Burbank v. Crooker, 7 Gray, 158; Vincent v. Cornell, 13 Pick. 234.

11 See Hunt v. Wyman, 100 Mass. 98; Kohler v. Hayes, 41 Cal. 455; Carter v. Kingman, 103 Mass. 517.

12 See Austin v. Dye, 46 N. Y. 500.

13 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 381.

14 See Wait v. Green, 35 Barb. 585; S. C. 62 Barb. 241; S. C. 36 N. Y. 556; or Langdell's Cases on Sales, 723.

§ 195. **Delivery as waiver of condition.** — *Need of determining question.* The difficulty in determining the exact character of contracts of sale attended with special stipulations,<sup>1</sup> is enhanced by the fact that it is often necessary to determine not only whether there is such a condition attached to the contract of sale, but also whether there has not been a waiver of such condition.<sup>2</sup>

*Delivery not decisive.* Delivery of itself would not, ordinarily, according to the prevailing view, amount to such a waiver of a condition requiring previous or contemporaneous payment or security;<sup>3</sup> but the inference derived from such an act would be rebuttable by other manifestations of intention to retain the title.<sup>4</sup>

*Protection of bona fide purchaser.* Yet it has been attempted to maintain in this regard a distinction in behalf of *bona fide* purchasers, identical with that which governs fraudulent sales.<sup>5</sup> In this view it has been maintained that mere delivery, even though qualified,

is, so far as the rights of innocent purchasers are affected, a waiver of conditions precedent,<sup>6</sup> and even in cash sales, of conditions concurrent.<sup>7</sup>

*Prevalent counter-view.* But the weight of authority favors the view that *bona fide* purchasers must stand upon the title of their vendors,<sup>8</sup> and that since delivery to the latter is often immaterial, and at all events indecisive as to the transfer of title,<sup>9</sup> it cannot have greater potency in conferring a title upon one who has not otherwise acquired it.<sup>10</sup>

1 See latter part of preceding section of book.

2 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 381.

3 See citations in next note.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 381. And consult *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720.

5 See *Mears v. Waples*, 4 Houst. 79; *Hall v. Hinks*, 21 Md. 406; *Vaughn v. Hopson*, 14 Bush, 337; *Old Dominion Steamship Co. v. Burkhardt*, 31 Gratt. 664; *Mich. Central R. R. Co. v. Phillips*, 60 Ill. 190, 194; *Leigh v. Mobile etc. R. R. Co.* 53 Ala. 165, 176; note to *Williams v. Merle*, 25 Am. Dec. 614. But consult *contra*, *Andrews v. Cox*, 42 Ark. 473; 48 Am. Rep. 68, 71.

6 *Brundage v. Camp*, 21 Ill. 233; *Van Duzor v. Allen*, 90 Ill. 499.

7 *Comer v. Cunningham*, 77 N. Y. 331; *Goodwin v. Bradley*, 63 Ill. 553. And see *Smith v. Lynes*, 1 Seld. 41; *Langdell's Cases on Sales*, 724; *Hollingsworth v. Napier*, 3 Caines, 182; *Western Transportation Co. v. Marshall*, 37 Barb. 509. Consult 2 *Schouler on Personal Property*, § 300. And compare *Stadtfeldt v. Huntsman*, 92 Pa. St. 53; 37 Am. Rep. 661, n. 664.

8 See citations in subsequent note. And consult *Harkness v. Russell*, 118 U. S. 663, 672, et seq. fully reviewing the authorities in the various States; *Andrews v. Cox*, 42 Ark. 473; 48 Am. Rep. 68, 71; note to *Williams v. Merle*, 25 Am. Dec. 615; *Heinbocke v. Zugbaum*, 5 Mont. 344; 51 Am. Rep. 59.

9 See preceding portion of section.

10 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 381, 382; citing *Sanders v. Keeber*, 28 Ohio St. 630; *Coggill v. Hartford etc. R. R. Co.* 3 Gray, 545; *Langdell's Cases on Sales*, 713; *Parmelee v. Catherwood*, 36 Mo. 439; *Pitts v. Owen*, 3 Wis. 145. And consult 2 *Schouler on Personal Property*, § 300.

§ 196. *Seller's possession.*—*Custodian's second sale.* It is immaterial, except as to creditors, that the possession remains with the vendor, where he has parted with the title, as he is then a mere custodian.<sup>1</sup> Hence his second

sale is a conversion, even if he is still unpaid,<sup>2</sup> and can convey no title to a *bona fide* purchaser.<sup>3</sup>

*Restored documents of title.* The same principle would apply where the vendor disposed of documents of title which were restored to him for a special purpose;<sup>4</sup> as where warehouse receipts, returned to him so that he could repack pork which he had sold, were pledged by him with a bank, which transferred them to an innocent purchaser.<sup>5</sup>

1 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 382.

2 *Chinery v. Viall*, 5 Hurl. & N. 288.

3 *Stanley v. Gaylord*, 1 Cush. 536; 48 Am. Dec. 643; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658. But see *contra*, note to *Williams v. Merle*, 25 Am. Dec. 615; citing, *Cullom v. Guillot*, 18 La. An. 608; *Shaw v. Levy*, 17 Serg. & R. 99. And compare *Hubbard v. Bliss*, 12 Allen, 590 (second sale after condition broken).

4 See case cited in next note.

5 *Benton v. Curryea*, 40 Ill. 320. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 382.

§ 197. **Transfers by fraudulent vendees.**—*Protection of bona fide purchaser.* Where a sale is effected by fraudulent inducements and completely consummated, and the fraudulent vendee makes a further transfer to an innocent party who buys for value and without notice, such *bona fide* purchaser takes a clear title.<sup>1</sup> As the doctrine has been recently expressed, if the owner of goods is induced by fraudulent representations to deliver property to an irresponsible purchaser, in pursuance of a contract of sale to him, and such purchaser, while in possession, transfers it for a valuable consideration to a third person, who acts in good faith, without notice of the fraud, the title of the good-faith purchaser will prevail over that of the first owner.<sup>2</sup>

*Exceptional character.* At first the tendency was to treat the protection thus accorded to the *bona fide* purchaser from a fraudulent vendee as an arbitrary exception,<sup>3</sup> akin to that founded on commercial usage in

the case of negotiable paper,<sup>4</sup> or on ancient custom in the case of markets overt.<sup>5</sup> Since fraud vitiates every contract into which it enters, it was regarded as plain enough, despite the suggestion that the property was changed,<sup>6</sup> that the fraudulent vendee had no title, and therefore, ordinarily, could convey none;<sup>7</sup> but it was considered that a *bona fide* purchaser having innocently parted with value, was a special favorite of the law, to whom such a rule was inapplicable.<sup>8</sup>

*Voidable title, etc.* The modern tendency, however, is to regard the title of the fraudulent vendee as not voidable at the instance of the original seller,<sup>9</sup> before the goods have passed into the hands of a *bona fide* purchaser, who takes the property freed from the taint of fraud to which he was neither party nor privy,<sup>10</sup> though in some jurisdictions, in justifying the protection of the *bona fide* purchaser, stress is laid rather upon his superior equity to the original seller, who is estopped from asserting his rights by his conduct in conferring the ostensible proprietorship upon the fraudulent vendee.<sup>11</sup> Yet in comparatively late cases, and even in those of the most recent date, the contract is still treated as void,<sup>12</sup> and the title as not passing,<sup>13</sup> while subsequently to the enunciation of the doctrine that the title of the fraudulent vendee was merely voidable or defeasible,<sup>14</sup> it was still said to be not easily explainable "how goods which never vested in the vendee can be transferred by him, so as to give the purchaser a good title."<sup>15</sup>

1 See *Rowley v. Bigelow*, 2 Pick. 307; 23 Am. Dec. 607; *Barnard v. Campbell*, 65 Barb. 286; 55 N. Y. 456; 58 N. Y. 73; or 17 Am. Rep. 208; *Old Dom. Steamship Co. v. Burckhardt*, 31 Gratt. 664; note to *Williams v. Merle*, 25 Am. Dec. 613. Fraudulent sales of copyrighted book: *Henry Bill Pub. Co. v. Smythe*, 27 Fed. Rep. 914.

2 *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; citing, *Curme v. Rauh*, 100 Ind. 247; *Parrish v. Thurston*, 87 Ind. 437.

3 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 382.

- 4 See *Barnard v. Campbell*, 55 N. Y. 453, 460.
- 5 See *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; sections on MARKETS OVERT.
- 6 *McCarty v. Vickery*, 12 Johns. 348.
- 7 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 382.
- 8 See *Mowrey v. Walsh*, 8 Cowen, 238.
- 9 See *Stevens v. Hyde*, 32 Barb. 130.
- 10 See *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Stevenson v. Newnham*, 13 Com. B. 285; 22 Law J. Com. P. 10; *Old Dominion Steamship Co. v. Burekhardt*, 31 Gratt 664.
- 11 See *Barnard v. Campbell*, 65 Barb. 286; S. C. 55 N. Y. 456; 53 N. Y. 73; or 17 Am. Rep. 208; *Root v. French*, 13 Wend. 572; 28 Am. Dec. 428; *Saltus v. Everett*, 20 Wend. 275; 32 Am. Dec. 541; *Cochran v. Stewart*, 21 Minn. 440.
- 12 *Hall v. Hinks*, 21 Md. 417.
- 13 *Barnard v. Campbell*, 65 Barb. 288; *Butler v. Collins*, 12 Cal. 457, and cases reviewed.
- 14 See *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607.
- 15 *George v. Kimball*, 24 Pick. 241. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 386.

§ 198. Superior equity of innocent purchaser.—*Occasioning loss, etc.* A reason for the favor shown to a *bona fide* purchaser from a fraudulent vendee has been found in New York, and elsewhere, in the equitable principle that when one of two innocent persons must suffer by the acts of a third, he who enabled such third party to occasion the loss must sustain it.<sup>1</sup>

*Conflicting maxims, etc.* This position was maintained in the face of the criticism that the fraud was the owner's misfortune, not his fault; that if he was to blame for parting with the possession, then the purchaser from a converting bailee would on like grounds also be protected; and further, that the real maxim of equity in such a conflict of claims was that the right which was prior in time should prevail.<sup>2</sup>

*Overcoming owner's legal rights.* For it was asserted, originally upon the analogy of negotiable paper, that in this instance the superior equity of the innocent purchaser,<sup>3</sup> though subsequent in time, overcame the legal rights of the owner, as in the equality of legal rights,

the supervening equity prevailed.<sup>4</sup> But this, it was objected, was only creating a fresh exception,<sup>5</sup> without investing the purchaser with the legal title, though it was only upon the strength of the right of possession involved in such legal title, that the purchaser could recover the property in cases where the owner had repossessed himself of it.<sup>6</sup>

*Estoppel of owner, etc.* It is substantially laid down, however, that the innocent purchaser from a fraudulent buyer has not a perfect title, but a superior equity, based on the estoppel of the latter from setting up his rights after having conferred on his vendee the apparent ownership.<sup>7</sup> In such a case, it is declared, the superior equity of the honest purchaser is allowed to overcome the legal rights of the owner, and this is said to be the only instance in which our law divests the title to property without the owner's consent or default.<sup>8</sup>

1 Root v. French, 13 Wend. 572; 28 Am. Dec. 428. And see Malcom v. Loveridge, 13 Barb. 372; Barnard v. Campbell, 55 N. Y. 459; Somes v. Brewer, 2 Pick. 202; 13 Am. Dec. 406; George v. Kimball, 24 Pick. 241; Kingsbury v. Smith, 13 N. H. 109; Cochran v. Stewart, 21 Minn. 438; White v. Garden, 10 Com. B. 926; Moyce v. Newington, Law R. 4 Q. B. D. 32; 28 Eng. Rep. 674.

2 Ash v. Putnam, 1 Hill, 306. The maxim "he who trusts most shall lose most," is regarded as more than overcome by the principle of the counter-maxim *caveat emptor*: See Fawcett v. Osborn, 32 Ill. 425; 83 Am. Dec. 278.

3 See Root v. French, 13 Wend. 570; 28 Am. Dec. 428; Andrews v. Dietrich, 14 Wend. 34.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 383.

5 Ash v. Putnam, 1 Hill, 307.

6 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 383.

7 Barnard v. Campbell, 65 Barb. 286; S. C. 55 N. Y. 456; S. C. 58 N. Y. 73; or 17 Am. Rep. 208. As stated in article on "Title from Fraudulent Vendees," 7 South Law Rev. 549, 558.

8 Barnard v. Campbell, 65 Barb. 286, 288, 289. Compare final opinion in 58 N. Y. 73, 75, or 17 Am. Rep. 208.

§ 199. *Estoppel of owner.*—*Statement of doctrine.* The principle which justifies the protection of a *bona fide* purchaser from a fraudulent vendee, as laid down in New York, is declared to be founded upon the idea that

where one trusts a party with the possession and apparent ownership of property,<sup>1</sup> voluntarily parting with the possession in the form of a sale, he puts it in the power of his vendor to deceive an innocent purchaser, and therefore he cannot enforce his right to retake the property against one whom that party has deceived, provided the latter has acted all the while in entire good faith, and paid his money for the property.<sup>2</sup> In such instances the equitable rule is said to apply,<sup>3</sup> that where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrong-doer has been enabled<sup>4</sup> to commit the fraud.<sup>5</sup>

*Equitable estoppel raised by law.* Just as there are various exceptional instances in which the law relieves the buyer of merchandise from the rule of *caveat emptor*,<sup>6</sup> as applied to the title,<sup>7</sup> so in favor of one acting with ordinary caution and prudence in the usual course of business, and as against those who have voluntarily conferred upon others the usual evidences of ownership or property, or an apparent authority to deal with it and dispose of it,<sup>8</sup> it is asserted that the law for obvious reasons, and with manifest justices, raises an equitable estoppel.<sup>9</sup>

*Apparent and real title and authority.* Applying the principle that the loss should fall on those aiding or abetting the fraud, or enabling it to be committed,<sup>10</sup> the law is said to declare that the apparent title or authority which exists by the act or omission of such parties shall, so far as concerns persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority.<sup>11</sup>

*Analogy and objections.* By assimilation to the familiar rule of agency, which protected parties who relied on a factor's apparent authority, the buyer was in this case justified for trusting to the appearance of prop-



erty.<sup>12</sup> But a difficulty suggested is that such apparent authority might exist in one who had no title to convey, as a mere bailee who was intrusted with the property and the documents of title;<sup>13</sup> and yet it was never contended that the owner was estopped as against a purchaser, however innocent, from such a converter.<sup>14</sup>

1 Effect of apparent authority: See *Saltus v. Everett*, 20 Wend. 279; 32 Am. Dec. 541; *Malcom v. Loveridge*, 13 Barb. 372; *Dows v. Rush*, 23 Barb. 157; *Craig v. Marsh*, 2 Daly, 61; *Combes v. Chandler*, 33 Ohio St. 184.

2 *Barnard v. Campbell*, 65 Barb. 290, 291; citing the charge of the judge at the trial.

3 See preceding section on SUPERIOR EQUITY, etc.

4 Doctrine in more general form, first applied in *Root v. French*, 13 Wend. 572; 28 Am. Dec. 428; criticised in *Ash v. Putnam*, 1 Hill, 306; adopted in *Malcom v. Loveridge*, 13 Barb. 372; *Kingsbury v. Smith*, 13 N. H. 109; *Cochran v. Stewart*, 21 Minn. 438; *White v. Garden*, 10 Com. B. 926; *Somes v. Brewer*, 2 Pick. 202; 13 Am. Dec. 406; *George v. Kimball*, 24 Pick. 241.

5 *Barnard v. Campbell*, 55 N. Y. 459. See article on "Title from Fraudulent Vendees," 7 South. Law Rev. 549, 558.

6 *Caveat emptor*: See 1 Bouvier Law Dict. (14th ed.) 248.

7 See *Fawcett v. Osborn*, 32 Ill. 425; 83 Am. Dec. 278.

8 See *Leigh v. Mobile etc. R. R. Co.* 53 Ala. 165, 178.

9 *Barnard v. Campbell*, 55 N. Y. 460. And see *Ash v. Putnam*, 1 Hill, 407; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Combes v. Chandler*, 33 Ohio St. 184; article on "Title from Fraudulent Vendees," 7 South. Law Rev. N. S. 549, 559; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; as quoted, *Barstow v. Savage Mining Co.* 64 Cal. 388; 49 Am. Rep. 705; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 386; citing, *Hall v. Hinks*, 21 Md. 418; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 681.

10 See preceding portion of section.

11 *Barnard v. Campbell*, 55 N. Y. 460. Compare final opinion in 58 N. Y. 73, or 17 Am. Rep. 208.

12 See *Somes v. Brewer*, 2 Pick. 201; 13 Am. Dec. 406; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 383.

13 Unauthorized sales by bailees: See § 184. Documents of title: See chapter on that subject. Fraudulent pledge by broker of customer's shares put in his keeping for sale, and estoppel of owner to claim against innocent pledgee: *Burton's Appeal*, 93 Pa. St. 214.

14 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 383. Besides it is not always easy to explain the function of estoppel in passing the title, in cases where the *bona fide* purchaser recovered the goods from the owner who had retaken them: See discussion just cited.

§ 200. Voidable or defeasible title. — *Derivation of doctrine.* The tendency of the modern cases is to adopt a  
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view based on a closer analysis of the fraudulent vendee's title, and which may have been suggested by the instance of a *prima facie* title<sup>1</sup> afforded by markets overt,<sup>2</sup> or by the inclination to treat the contracts of infants as voidable and not void;<sup>3</sup> but it seems to have been more immediately derived<sup>4</sup> from the analogy of real property, where a like distinction was maintained.<sup>5</sup>

*Transfer of title.* The title of the fraudulent vendee had been assumed to be utterly void;<sup>6</sup> but this view of the contract as entirely null implied that the vendee might take advantage of his own wrong and treat it as such;<sup>7</sup> whereas it was merely voidable at the election of the vendor.<sup>8</sup> The question arises, however, whether this means that the contract is void until ratified by the defrauded owner, or valid until rescinded.<sup>9</sup> If the former be the case, and the title does not pass at the time of the sale upon delivery, it is asked when it does pass, and whether it remains forever in the clouds, or *in nubibus*, and what definite act is essential to pass it afterwards.<sup>10</sup> It has been considered not enough to say that the title passes or not, as the vendor pleases,<sup>11</sup> since the very right of rescission implies the subsistence of the contract, for there can hardly be a revocation of a transfer which never took place, and there must have been a title for the owner to disaffirm, as well as a title to convey to the innocent purchaser.<sup>12</sup> The conclusion is accordingly deemed irresistible that a fraudulent vendee of chattels, where there is an absolute and unqualified delivery with intent to transfer the property, acquires the title, though it be merely a naked, voidable, defeasible title,<sup>13</sup> and that on a sale by such vendee the title passes to a *bona fide* buyer.<sup>14</sup>

*Consent to transfer.* In such a case there is no room for the application of the doctrine that no one can be divested of his property except by his own consent or

by operation of law,<sup>15</sup> for the owner in this instance has consented to the transfer of his title as well as his possession;<sup>16</sup> and this consent is binding, by whatever artifice it was produced,<sup>17</sup> since when a compact is consummated, the motive that led to such a deliberate act cannot alter its obligatory character.<sup>18</sup>

- 1 See *White v. Garden*, 10 Com. B. 924.
- 2 Markets overt : See §§ 178-180.
- 3 See *Walk. Am. Law* (4th ed.) 427.
- 4 According to article on "Conversion by Purchase," 15 Am. Law Rev. 363, 384.
- 5 See *Somes v. Brewer*, 2 Pick. 184, 201 ; 13 Am. Dec. 406.
- 6 See *Stevens v. Hyde*, 32 Barb. 175.
- 7 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 384.
- 8 See *Matteawan Co. v. Bentley*, 13 Barb. 644 ; *Ayres v. Hewitt*, 19 Me. 281 ; *Stevenson v. Newnham*, 13 Com. B. 235.
- 9 See *Oakes v. Turquand*, 2 Eng. & Ir. App. 275.
- 10 *Stevens v. Hyde*, 32 Barb. 180. The further inquiry made is, at what precise moment thereafter the title of the vendor is divested, and when it can be said with certainty that the one has parted with and the other acquired the title : *Stevens v. Hyde*, 32 Barb. 180.
- 11 See *George v. Kimball*, 24 Pick. 241.
- 12 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 384.
- 13 See *Rowley v. Bigelow*, 12 Pick. 307 ; 23 Am. Dec. 607.
- 14 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 384.
- 15 See *Saltus v. Everett*, 20 Wend. 267 ; 32 Am. Dec. 541 ; *Fawcett v. Osborn*, 32 Ill. 411 ; 83 Am. Dec. 278, 281.
- 16 See *Old Dom. Steamship Co. v. Burckhardt*, 31 Gratt. 664.
- 17 Article on "Title from Fraudulent Vendees," 7 South Law Rev. N. S. 549.
- 18 *Oakes v. Turquand*, 2 Eng. & Ir. App. 349 ; *Somes v. Brewer*, 2 Pick. 201 ; 13 Am. Dec. 406 ; from which it appears that such is also the reasoning of the civil and the Scotch law. See *Pothier on Obligations*, pt. 1, ch. 1, art. 3, § 1, No. 29, and *Brown on Sales*, 396.

§ 201. Title of innocent purchaser.—*Liability to avoidance.* The doubt has been suggested whether an innocent purchaser does not take the title with all its defects, so that it is still liable to avoidance in his hands,<sup>1</sup> and whether the conveyance of a defeasible title can transfer aught but a defeasible title.<sup>2</sup>

*Party not privy to fraud.* But the answer to this is said to be, that the *bona fide* purchaser not only failed

to participate in the fraud, but was not even aware of its perpetration,<sup>3</sup> and should not suffer its penalty.<sup>4</sup> Since delay gives the aspect of ratification, the owner should exercise due diligence in rescinding,<sup>5</sup> and his demand comes too late when the goods have passed into the control of an innocent purchaser;<sup>6</sup> for such an option to rescind a contract for fraud<sup>7</sup> is a legal privilege, not binding upon one who was not privy to the fraud.<sup>8</sup>

*Removal of element of defeasibility.* Hence, it is suggested that such option is not enforceable against the *bona fide* purchaser, who obtains a perfect title free from the possibility of impairment, not by virtue of the transfer itself, for no one can convey a better title than he has,<sup>9</sup> but an operation of law, which eliminates from the title an element of it which is no longer applicable.<sup>10</sup>

1 See citations in next note.

2 See argument in *Williamson v. Russell*, 39 Conn. 406; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 384.

3 See *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Stevenson v. Newnham*, 13 Com. B. 285; 22 Law J. Com. P. 10.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 385.

5 Diligence in rescission generally: See 2 Bouvier Law Dict. tit. Rescission of Contracts (14th ed.), 463.

6 See *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

7 See *Stevenson v. Newnham*, 13 Com. B. 285; 22 Law J. Com. P. 10.

8 See *Rowley v. Bigelow*, 12 Pick. 306; 23 Am. Dec. 607; article on "Conversion by Purchase," 15 Am. Law Rev. 363, 385.

9 See *Leigh v. Mobile etc. R. R. Co.* 58 Ala. 165, 176; *Barnard v. Campbell*, 55 N. Y. 453, 460; *Fawcett v. Osborn*, 32 Ill. 425; 83 Am. Dec. 278, 282; *Evansville etc. R. R. Co. v. Erwin*, 84 Ind. 457, 466; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180, 184.

10 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 385. And it is only in this sense of the removal of an element of defeasibility that the innocent purchaser can ever be said to have a "superior title," as is declared in *Wickham v. Martin*, 13 Gratt. 431, and *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 683.

‡ 202. *Title of fraudulent vendee. Result of analysis.* The result of the analysis of the nature of the fraudulent vendee's title is that in the first instance the property passes in the subject-matter, and an innocent

purchaser from the fraudulent possessor<sup>1</sup> may acquire an indefeasible title to it, though it is voidable between the parties.<sup>2</sup>

*Established doctrine.* And it must be considered as established that the fraud only gives a right to rescind a contract of purchase; that the property vests until avoided;<sup>3</sup> and that all the mesne dispositions to parties not parties to the fraud, or at least not cognizant thereof, are valid.<sup>4</sup>

1 Or rather, from the fraudulent vendee: See *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

2 *Stevenson v. Newnham*, 13 Com. B. 285; 22 Law J. Com. P. 10.

3 See *Mears v. Waples*, 3 Houst. 581.

4 *Stevenson v. Newnham*, 13 Com. B. 285; 22 Law J. Com. P. 10. And even upon the flexible ground of public policy this conclusion has been justified, because if it were otherwise between the parties it would sometimes prove prejudicial to the vendor himself, whose interest it may be, under some circumstances, to treat the contract as valid: *Williams v. Given*, 6 Gratt. 268. And it is further declared that as to innocent purchasers, it would be a rule fraught with great evil to make them responsible for every fraud practiced in the course of the derivation of their title: *Williams v. Given*, 6 Gratt. 268. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 385.

§ 203. *Statements of doctrine.*—*Exposition generally followed.* According to the exposition of the doctrine treating the title of the fraudulent vendee as voidable or defeasible, which is most frequently cited and most generally followed in America,<sup>1</sup> the rule is taken to be well settled that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but one which is voidable and defeasible, as between the vendor and vendee, if obtained by false and fraudulent representations.<sup>2</sup> It is declared that the vendor, therefore, can reclaim his property as against the vendee, or any other person standing upon his title, but not against a *bona fide* purchaser without notice of the fraud.<sup>3</sup> The ground of exception in favor of the latter is said to be that he purchased of one having a possession under a contract of sale, and with a title to

the property, though defeasible and voidable as between the parties to the original sale and purchase, on the ground of fraud;<sup>4</sup> but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud.<sup>5</sup>

*New York view.* In New York, however, it is said that the superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, to that of such owner seeking to reclaim his property, is based upon the fact that acting upon the evidence of title which the owner has permitted the wrong-doer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership, if he is compelled to surrender the property.<sup>6</sup>

1 See citations in later notes of section.

2 *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607.

3 *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607. Until the contract is rescinded or avoided, the title or property in the goods is in the buyer, and he may sell or dispose of them to a *bona fide* purchaser for value, and thus vest in him a good, indefeasible, and irrevocable title to the goods: *Mears v. Waples*, 3 Houst. 581.

4 See § 200, on VOIDABLE OR DEFEASIBLE TITLE.

5 *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607 (1832). See, also, *Kingsbury v. Smith*, 13 N. H. 109 (1842), *Williams v. Given*, 6 Gratt. 268 (1849); *Keyser v. Harbeck*, 3 Duer, 373 (1854); *Titcomb v. Wood*, 38 Me. 563 (1854); *Mears v. Waples*, 3 Houst. 581 (1868), *S. C.* 4 Houst. 62 (1869); *Old Dominion S. S. Co. v. Burckhardt*, 31 Gratt. 664 (1879). Consult article on "Conversion by Purchase," 15 Am. Law Rev. 363, 386, 387.

6 *Barnard v. Campbell*, 58 N. Y. 75; 17 Am. Rep. 208. See article on Title from Fraudulent Vendees, 7 South. Law Rev. N. S. 549, 560.

§ 204. *Prevalence of exemption.*—*Without definite or consistent grounds.* In many of the cases the protection of the *bona fide* purchaser of chattels from a fraudulent vendee is simply asserted, without any reason or definite ground being given therefor,<sup>1</sup> while in others it is treated as an exception to ordinary rules, and the title of such fraudulent vendee is declared to be void,

so that he has none to convey, but yet the innocent purchaser is said to acquire the property, because he has parted with value and is ignorant of the fraud.<sup>2</sup>

*Recognition in United States.* But though justified in different decisions on a variety of grounds, the protection of the *bona fide* purchaser from a vendee who has effected a sale by fraudulent devices, or with fraudulent designs, is widely and almost universally recognized in this country.<sup>3</sup>

It may be regarded as established in at least the following States of the Union: California,<sup>4</sup> Connecticut,<sup>5</sup> Delaware,<sup>6</sup> Georgia,<sup>7</sup> Illinois,<sup>8</sup> Indiana,<sup>9</sup> Kansas,<sup>10</sup> Kentucky,<sup>11</sup> Maine,<sup>12</sup> Maryland,<sup>13</sup> Massachusetts,<sup>14</sup> Minnesota,<sup>15</sup> Mississippi,<sup>16</sup> New Hampshire,<sup>17</sup> New York,<sup>18</sup> Ohio,<sup>19</sup> Pennsylvania,<sup>20</sup> Tennessee,<sup>21</sup> Virginia,<sup>22</sup> and Wisconsin.<sup>23</sup>

*Adoption in England.* In England the result of recent cases<sup>24</sup> is also to accord like protection, and upon the ground of the prevalent American doctrine of the voidable or defeasible title,<sup>25</sup> although stress is laid rather on the intention of the original vendor than on the actual transfer of the title.<sup>26</sup>

1 *West. Transportation Co. v. Marshall*, 4 Abb. N. Y. App. 575; *Trott v. Warren*, 11 Me. 227; *Sparrows v. Chesley*, 19 Me. 79; *Ditson v. Randall*, 33 Me. 202; *Powell v. Bradley*, 9 Gill & J. 220; *Gibson v. Moore*, 7 Mon. B. 92; *Ohio etc. R. Co. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Forster*, 48 Ill. 507; *Thompson v. Lee*, 3 Watts & S. 479; *Sinclair v. Healey*, 40 Pa. St. 417; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118.

2 *Mowrey v. Walsh*, 8 Cowen, 238; *Root v. French*, 13 Wend. 570; 28 Am. Dec. 428; *Hall v. Hinks*, 21 Md. 417. See article on "Title from Fraudulent Vendees," 7 South. Law Rev. N. S. 549, 560.

3 See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 387; note to *Williams v. Merle*, 25 Am. Dec. 613.

4 *Palge v. O'Neal*, 12 Cal. 483; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118.

5 *Thompson v. Rose*, 16 Conn. 71; *Williamson v. Russell*, 39 Conn. 406.

6 *Mears v. Waples*, 3 Houst. 581; S. C. 4 Houst. 62.

7 *Kern v. Thurber*, 57 Ga. 172.

8 *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Ohio etc. R. R. Co. v. Kerr*, 49 Ill. 458.

- 9 *Sharp v. Jones*, 18 Ind. 314; 81 Am. Dec. 359.
- 10 *Wilson v. Fuller*, 9 Kan. 76.
- 11 *Arnott v. Cloudas*, 4 Dana, 300; *Wood v. Yeatman*, 15 Mon. B. 271.
- 12 *Neal v. Williams*, 18 Me. 391; *Sparrow v. Chesley*, 19 Me. 79; *Titson v. Randall*, 33 Me. 202; *Titcomb v. Wood*, 38 Me. 563.
- 13 *Powell v. Bradlee*, 9 Gill & J. 220; *Hall v. Hinks*, 21 Md. 406.
- 14 *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Hoffman v. Noble*, 6 Met. 68; 39 Am. Dec. 611; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394.
- 15 *Cochran v. Stewart*, 21 Minn. 435.
- 16 *Lee v. Portwood*, 41 Miss. 109.
- 17 *Kingsbury v. Smith*, 13 N. H. 109; *Willoughby v. Moulton*, 47 N. H. 205.
- 18 *Mowrey v. Walsh*, 8 Cowen, 238; *Root v. French*, 13 Wend. 570; 28 Am. Dec. 428; *Andrews v. Dietrich*, 14 Wend. 34; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Malcom v. Loveridge*, 13 Barb. 372; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, 3 Duer, 373; *Dows v. Rush*, 28 Barb. 157; *Stevens v. Hyde*, 32 Barb. 171; *Craig v. Marsh*, 2 Daly, 61; *Western Transportation Co. v. Marshall*, 4 Abb. N. Y. App. 575; *Paddon v. Taylor*, 44 N. Y. 371; *Devoe v. Brandt*, 53 N. Y. 462; *Barnard v. Campbell*, 65 Barb. 286; S. C. 58 N. Y. 73; 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 254.
- 19 *Dean v. Yates*, 22 Ohio St. 388; *Combes v. Chandler*, 33 Ohio St. 178.
- 20 *Thompson v. Lee*, 3 Watts & S. 429; *Sinclair v. Healey*, 40 Pa. St. 417.
- 21 *Arendale v. Morgan*, 5 Sneed, 703; *Hawkins v. Davis*, 5 Jere Baxter, 638.
- 22 *Williams v. Given*, 6 Gratt. 268; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.
- 23 *Shufeldt v. Pease*, 16 Wis. 689; *Rice v. Cutter*, 17 Wis. 362.
- 24 Representative of these are: *White v. Garden*, 10 Com. B. 919; 20 Law J. Com. P. 167 (1851); and *Pease v. Gloahec*, Law R. 1 P. C. 220; 3 Moore P. C. N. S. 556 (1866). The latest to the same effect are: *Attenborough v. London & St. Katharine's Dock Co.* Law R. 3 Com. P. D. 450; 47 Law J. Com. P. 763 (1878); *Babcock v. Lawson*, Law R. 4 Q. B. D. 394; Law J. 48 Q. B. 524; 28 Eng. Rep. 831; affirmed in Law R. 5 Q. B. D. 284; Law J. 49 Q. B. 403; 29 Eng. Rep. 296 (1879).
- 25 See *Old Dom. Steamship Co. v. Burckhardt*, 31 Gratt. 654. But compare *Moyce v. Newington*, Law R. 4 Q. B. D. 32; 28 Eng. Rep. 674.
- 26 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 387.

§ 205. **Limitations upon exemption.**—*Purchaser from fraudulent possessor.* The protection accorded to a further transferee under a fraudulent sale extends only to a *bona fide* purchaser from a fraudulent vendee,<sup>1</sup> and not to such a purchaser from a fraudulent bailee or possessor,<sup>2</sup> who certainly has no better title than any



ordinary bailee,<sup>3</sup> obtaining the possession freely and without artifice.<sup>4</sup> Hence, the exemption does not apply where there is no complete sale, at least to the party who secures the goods;<sup>5</sup> as where such party represents himself to be a different person, or the agent or partner of a business firm in good standing, and the sale is really made to the parties thus personated, and upon their credit;<sup>6</sup> for in such cases the relation of vendor and vendee does not exist<sup>7</sup> between the original parties to the transaction.<sup>8</sup> Thus, where one is induced by a trick to deliver the possession of his personal property to a person representing himself to be the agent of a well-known firm, and such delivery was made under the supposition and agreement that the sale is to the firm, but it turns out that such pretended agent is a stranger to the firm, there is no actual sale,<sup>9</sup> and the original owner will retain the title to the property, even as against a good faith purchaser from such pretended agent, or his vendee.<sup>10</sup>

*Notice, etc., of fraud.* So it is not alone requisite, according to the current of authority, that the second purchaser should be free from participation in the fraud, but that he should be free from notice of it, or knowledge of circumstances to put him on inquiry,<sup>11</sup> such as would usually arrest the attention of the ordinarily prudent business man.<sup>12</sup>

*Purchase for value.* And it is generally stated that the goods must not have been taken merely in payment of a pre-existing debt,<sup>13</sup> but that value must have been parted with, advances made, or liability incurred at the time of the transfer, or upon its strength.<sup>14</sup>

1 See *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

2 See citations given in later note. Fraudulent bailee of non-negotiable instrument: *Midland R. R. Co. v. Hitchcock*, 37 N. J. Eq. 549.

3 See § 184, on UNAUTHORIZED SALES BY BAILEES. No transfer of title where bill of sale obtained by fraud: *Hogan v. Holeman*, 14 Phila. 484, 594.

4 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 388. No transfer of title to cattle obtained by forged order: *Gammel v. Coutts*, 1 Tex. App. (Civ. Cas.) § 1168.

5 See authorities cited in next note. And consult article on "Title from Fraudulent Vendees," 7 South. Law Rev. N. S. 549, 561.

6 *Kingsford v. Merry*, 1 Hurl. & N. 503; *Higsons v. Burton*, 26 Law J. Ex. 342; *Hardman v. Booth*, 1 Hurl. & C. 803; *Fowler v. Hollins*, Law R. 7 Q. B. 616; 41 Law J. Q. B. 277; 3 Eng. Rep. 238; affirmed, 7 Eng. & Ir. App. 757; 14 Eng. Rep. 123; *Lindsay v. Cundy*, Law R. 2 Q. B. D. 96; 46 Law J. Q. B. 233; affirmed as *Cundy v. Lindsay*, Law R. 3 App. Cas. 459; 24 Eng. Rep. 345; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 637; *Dean v. Yates*, 22 Ohio St. 383; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.

7 See *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. 664.

8 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 388. And where parties consigned wool to a broker to whom they would not sell, on the understanding that it was sold to an undisclosed principal in good credit with them, there is no sale to the broker, and he cannot convey a good title to a *bona fide* purchaser: *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439. Fraudulent obtaining of tickets by agent, *bona fide* purchaser not protected: *Frank v. Ingalls*, 41 Ohio St. 560.

9 *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180.

10 *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; citing, *Hamet v. Letcher*, 37 Ohio St. 553; 41 Am. Rep. 519; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 679; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; *Cundy v. Lindsay*, Law R. 3 App. Cas. 459; 24 Eng. Rep. 345.

11 *Barnard v. Campbell*, 53 N. Y. 73; 17 Am. Rep. 208.

12 *Cochran v. Stewart*, 21 Minn. 475; *Green v. Humphreys*, 50 Pa. St. 212. But see *Mears v. Waples*, 4 Houst. 62. Consult articles on "Conversion by Purchase," 15 Am. Law Rev. 363, 383; "Title from Fraudulent Vendees," 7 South. Law Rev. N. S. 567, 538, discussing good faith and notice.

13 *Root v. French*, 13 Wend. 570; 28 Am. Dec. 423; *Barnard v. Campbell*, 53 N. Y. 73; 17 Am. Rep. 203; *Stevens v. Brennan*, 79 N. Y. 254; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 113. *Contra*, *Shufeldt v. Pease*, 16 Wis. 639; *Butters v. Houghwout*, 42 Ill. 18.

14 *Barnard v. Campbell*, 53 N. Y. 73; 17 Am. Rep. 208; *Padden v. Taylor*, 44 N. Y. 371; *Kingsbury v. Smith*, 13 N. H. 109. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 388. And consult discussion of consideration in article on "Title from Fraudulent Vendees," 7 South. Law Rev. N. S. 549, 569. Taking a pledge of stock as collateral security for a pre-existing debt, from one who obtained the stock by fraudulent pretenses, is not such a purchase for value as to cure the defect in the title or preclude the original owners from reclaiming their stock on the ground of its transfer: *Linnard's Appeal*, 3 Atl. Rep. (Pa.) 846.

§ 206. Obtaining goods by false pretenses.—*English legislation.* In England there is a statutory exception

to the usual rule<sup>1</sup> which confirms the title of the *bona fide* purchaser, made in cases where the goods are obtained by criminal false pretenses.<sup>2</sup> In such instances, just as where the goods are procured by larceny, their restoration to the owner is ordered upon the conviction of the offender.<sup>3</sup> Before such enactment it was held otherwise;<sup>4</sup> and it has recently been ruled that the effect of the statute is not to revest the title in the vendor as against a *bona fide* purchaser who had bought before the conviction;<sup>5</sup> so that the doctrine is assimilated<sup>6</sup> to that governing the purchase of stolen goods in market overt.<sup>7</sup>

*View in this country.* In this country it was at first attempted to create the same exception in States where the offense of obtaining goods by false pretenses might amount to felony;<sup>8</sup> but the doctrine was sifted and found untenable,<sup>9</sup> for it was perceived that the nature or degree of punishment which the law may attach to the fraudulent pretense or contrivance cannot affect the title of the subsequent innocent purchaser.<sup>10</sup>

1 See 25 Vict. ch. 96, § 100, re-enacting and enlarging, 7, 8, Geo. IV. ch. 29, § 57.

2 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 388.

3 See enactments cited in note before last.

4 See *Parker v. Patrick*, 5 Term Rep. 175, explained in *Keyser v. Harbeck*, 3 Duer, 329.

5 *Movce v. Newington*, Law R. 4 Q. B. D. 32; 48 Law J. Q. B. 125; 28 Eng. Rep. 674. See, also, *Lindsay v. Cundy*, Law R. 1 Q. B. D. 348, 357; 45 Law J. Q. B. 381; dissenting from *Nickling v. Heaps*, 21 L. T. R. 754.

6 Article on "Conversion by Purchase," 15 Am. Law Rev. 363, 383, 389.

7 Markets overt: See §§ 173-180.

8 *Andrews v. Dietrich*, 14 Wend. 31; *Robinson v. Dauchy*, 3 Barb. 20.

9 *Malcom v. Loveridge*, 13 Barb. 372; *Keyser v. Harbeck*, 3 Duer, 373; *Cochran v. Stewart*, 21 Minn. 435; *Williams v. Given*, 6 Gratt. 268.

10 *Williams v. Given*, 6 Gratt. 268. See article on "Conversion by Purchase," 15 Am. Law Rev. 363, 389.

## CHAPTER XV.

### FACTORS' ACTS.

- § 207. Factors' acts in general.
- § 208. Occupations covered.
- § 209. Intrusting goods or documents.
- § 210. Apparent ownership or authority.

§ 207. Factors' acts in general.—*Factor's pledge at common law.* A factor or commission merchant<sup>1</sup> has an assignable lien on his principal's goods for advances made;<sup>2</sup> but if he pledge beyond this for his own use, he is, according to the strict construction of the common law, deemed guilty of a conversion,<sup>3</sup> and the pledge acquires no title to the goods against a subsequent *bona fide* purchaser from the factor.<sup>4</sup>

*Prevalence of these enactments.* But the rigor of the rule has been modified by the passage of factors' acts in England<sup>5</sup> and Canada,<sup>6</sup> and similar enactments in many of the States of the Union,<sup>7</sup> including New York,<sup>8</sup> Massachusetts,<sup>9</sup> Alabama,<sup>10</sup> California,<sup>11</sup> Maine,<sup>12</sup> Ohio,<sup>13</sup> Pennsylvania,<sup>14</sup> Rhode Island, and probably other States.<sup>15</sup>

*Usual provisions.* These usually provide for the protection of *bona fide* purchasers or pledgees<sup>16</sup> from the factor, consignee, or other agent intrusted with the possession of the goods,<sup>17</sup> if the transaction be in the ordinary course of business,<sup>18</sup> without notice of the agent's want of authority,<sup>19</sup> especially when the agent holds such documents of title or control as bills of lading or warehouse receipts, or in England-dock warrants, delivery orders, and the like;<sup>20</sup> with the proviso, at least under the British decisions, that the goods were transferred for advances made,<sup>21</sup> and not merely as security for an antecedent debt.<sup>22</sup>

*Protection independent of.* Protection under such, or like circumstances, has even been justified irrespective of these statutes,<sup>23</sup> at least where the person having possession of the goods, and the marks of title,<sup>24</sup> was one who from the nature of his employment might be presumed to have had the right to sell the property.<sup>25</sup>

*Theory of such enactments.* And the theory of such legislative intervention is, that the innocent pledgee is justified in treating as owners those whom the owners have themselves clothed with the *indicia* of title.<sup>26</sup>

1 See 1 Bouvier Law Dict. tit. Factor.

2 Donald v. Suckling, Law R. 1 Q. B. 585.

3 Story on Agency, § 113; McCombie v. Davis, 7 East, 5; Wright v. Solomon, 19 Cal. 64; 79 Am. Dec. 196. And see Hayes v. Campbell, 55 Cal. 421, 424.

4 Nowell v. Pratt, 5 Cush. 111. See "Conversion by Purchase," 15 Am. Law Rev. 373; § 188, on TRANSFER BY FACTOR, under chapter on BONA FIDE PURCHASERS.

5 4 Geo. IV. ch. 83 (1823); 6 Geo. IV. ch. 94 (1825); 5, 6, Vict. ch. 39 (1842); 40, 41, Vict. ch. 39 (1877). See 1 Chitty on Contracts (11th Am. ed.), 298, 300; Campbell on Sales, 412, 417; Bennett's Benjamin on Sales, p. 20, § 19; and pp. 922, 926, §§ 809, 809 a; Cole v. Northwestern Bank, 9 C. P. 470; 10 C. P. 354; Johnson v. The Credit Lyonnais, 2 C. P. Div. 224; 3 C. P. Div. 32; Nickerson v. Darrow, 5 Allen, 419, 422; Navulshaw v. Brownrigg, 2 De Gex, M. & G. (Am. ed.) 441, 445, and notes; Kaltenbach v. Lewis, Law R. 24 Ch. D. 54.

6 Consol. Stats. Can. ch. 54 (1859); In re Coleman, 36 Up. Can. Q. B. 559; Todd v. Liverpool etc. Ins. Co. 20 Up. Can. C. P. 523; Cockburn v. Sylvester, 27 Up. Can. C. P. 34; reversed in 1 Ont. App. 471.

7 See 2 Kent. Com. 628, n. b; Smith Merc. Law (Am. ed.) 126, n.; Jones' Pledges, 333, 353, stating State statutes; Bennett's Benjamin, and 1 Corbin's Benjamin, § 19; Story on Sales, § 104; 2 Schouler on Personal Property, § 556, note on p. 568; Warner v. Martin, 11 How. 209.

8 N. Y. Rev. Stats. 76; Jennings v. Merrill, 20 Wend. 9.

9 Mass. Rev. Stats. 1882, 417; Ullmann v. Barnard, 7 Gray, 554; Mich. State Bank v. Gardner, 15 Gray, 362; De Wolf v. Gardner, 12 Cush. 19.

10 Bott v. McCoy, 20 Ala. 578.

11 Cal. Civ. Code, § 2369; Wisp v. Hazard, 66 Cal. 459. And see Green v. Campbell, 52 Cal. 586, 589.

12 See Me. Rev. Stats. 326.

13 Ohio Rev. Stats. 1880, § 3216, etc.

14 Brightley's Purdon's Digest, 664.

15 See "Conversion by Purchase," 15 Am. Law Rev. 374; Md. Rev. Code, 291.

- 16 Compare *Dodge v. Meyer*, 61 Cal. 405.
- 17 Compare *Chicago etc. Co. v. Lowell*, 60 Cal. 454.
- 18 See proviso later in paragraph.
- 19 Compare *Dodge v. Meyer*, 61 Cal. 405.
- 20 See next chapter on DOCUMENTS of TITLE; "Conversion by Purchase," 15 Am. Law Rev. 363, 374.
- 21 As to extent of these, see *Navulshaw v. Brownrigg*, 2 De Gex, M. & G. 441; 21 Law J. Ch. 57; *Portalis v. Tetty*, Law R. 5 Eq. 140.
- 22 *Heyman v. Flewkes*, 13 Com. B. N. S. 519; *Jewan v. Whitworth*, Law R. 2 Eq. 692; *Macnee v. Gorst*, Law R. 4 Eq. 315; *Portalis v. Tetty*, Law R. 5 Eq. 140; *Vickers v. Hertz*, Law R. 2 H. L. S. 113. See *Campbell on Sales*, 412, main basis of discussion of proviso.
- 23 See *Story on Agency*, § 113, n.; *Higgon's v. Burton*, 23 Law J. Ex. 342.
- 24 See *Nixon v. Brown*, 57 N. H. 34; *Western Union R. R. Co. v. Wagner*, 65 Ill. 197.
- 25 *Higgon's v. Burton*, 23 Law J. Ex. 32.
- 26 See "Conversion by Purchase," 15 Am. Law Rev. 363, 474; *Davis v. Russell*, 52 Cal. 611, 616.

§ 208. **Occupations covered.**—*Wharfinger, warehouseman, etc.* The English factors' acts, which were designed to overcome the effect of previous rulings,<sup>1</sup> have been held not to apply to a wharfinger, who usually receives goods without power to sell;<sup>2</sup> nor to a warehouseman, although he was also in the habit of acting as a wool-broker,<sup>3</sup> although they have been held to cover the case of a picture-dealer, whose ordinary business was not that of selling pictures.<sup>4</sup>

*Transactions not mercantile.* Nor have they been regarded as extending to transactions which are not of a mercantile character,<sup>5</sup> as sales of furniture or goods in possession of a tenant, or of a bailee for hire,<sup>6</sup> so that a purchaser in good faith from such vendors would be liable in trover to the true owner.<sup>7</sup>

*Factor "perching" goods.* But a factor or commission merchant to whom goods are sent to be "perched," or stretched on poles for examination by a pretended purchaser, may be deemed an agent within the English acts.<sup>8</sup>

1 See *Fletcher v. Heath*, 7 Barn. & C. 517; *Phillips v. Heath*, 6 Mees. & W. 572; *Hatfield v. Phillips*, 9 Mees. & W. 647; *Evans v. Trueman*, 1 Moody & R. 10; *Benzi v. Stewart*, 4 Man. & G. 25; *Taylor v. Rymer*, 3 Barn. & Adol. 320. Cases collected and stated: *Campbell on Sales*, 413.

2 *Mark v. Whittenbury*, 2 Barn. & Adol. 484.

3 *Cole v. North Western Bank*, 9 C. P. 470; 10 C. P. 354. Case considered: *Campbell on Sales*, 415.

4 *Hayman v. Flewker*, 13 Com. B. N. S. 519. Case noted: *Bennett's Benjamin on Sales*, p. 24, § 20.

5 *Wood v. Rowcliffe*, 6 Hare, 183. And see *Baines v. Swainson*, 4 Best & Smith, 270.

6 *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomat*, 1 Com. B. 670. See *Bennett's Benjamin on Sales*, p. 22, § 19.

7 See cases last cited; also § 184, on UNAUTHORIZED SALES BY BAILEES.

8 *Baines v. Swainson*, 4 Best & Smith, 270. At least if the jury should so hold, and should decide that his sale to another party took place in the ordinary course of business: *Baines v. Swainson*, 4 Best & Smith, 270. Case stated: *Bennett's Benjamin on Sales*, pp. 24, 25, § 20.

§ 209. *Intrusting goods or documents.*—*Vendee as agent, etc.* The terms “agent intrusted with goods or documents of title” were held, prior to the latest English factors’ acts, not to include a vendee thus intrusted, because he holds in his own right.<sup>1</sup> But a vendee is embraced by the last amendatory enactment,<sup>2</sup> which greatly extends the circumstances under which reliance may be placed, upon the ostensible control of property as implying a title to sell.<sup>3</sup>

*Revocation of factor's authority.* So prior to the most recent act, it was held that a factor is not “intrusted with the goods,” after his authority has been revoked, and he has been ordered to deliver the property to another factor for account of the foreign consignor,<sup>4</sup> although he had disobeyed the order, and remained in possession of the wine in controversy.<sup>5</sup> But the amendatory statute renders a secret revocation of the intrustment or agency ineffectual against those making purchases or advances without notice of the same.<sup>6</sup>

*Conflicting sales by owner and commission merchant.* And in this country it has been ruled that a commission merchant passes a good title, and is not liable in trover to the owner for making a sale and delivery of property after the owner had sold but not delivered the same property,<sup>7</sup> but before notice of such transaction or of any revocation of his authority.<sup>8</sup>

*Vendor holding documents of title.* So before the latest legislation in England covering the case of vendors permitted to retain documents of title to goods,<sup>9</sup> a tobacco broker and importer in whose name a quantity of that article was allowed to remain by a vendee on the dock-books, and who by means of the warrants he received pledged the property to another,<sup>10</sup> was held not to be intrusted with the warrants within the existing enactments.<sup>11</sup>

*Fraudulent procurement of document of title.* But the mere fact that the document of title came into the factor's hands in consequence of his false and fraudulent representations to the owner, has been regarded as not affecting the transferee, if it appears that the owner really intrusted the factor or his representative with the document,<sup>12</sup> though if a person gets possession of such a document by fraud without having been intrusted with it at all, he has no title to convey.<sup>13</sup>

1 *Jenkyns v. Osborne*, 7 Man. & G. 678; *Van Casteel v. Booker*, 2 Ex. 691. And see *Fuentes v. Montis*, Law R. 3 Com. P. 268; Law R. 4 Com. P. 93; *Bennett's Benjamin on Sales*, p. 22, § 19; and p. 935, § 818. (Sources of paragraph).

2 Act of 1877, 40, 41 Vict. ch. 39.

3 *Campbell on Sales*, 55. So as to embrace almost every situation in which any person in the ordinary course of mercantile business is likely to have such control placed or left in his hands; *Campbell on Sales*, 55.

4 *Fuentes v. Montis*, Law R. 3 Com. P. 268; Law R. 4 Com. P. 93.

5 *Fuentes v. Montis*, Law R. 3 Com. P. 268; Law R. 4 Com. P. 93. Case stated and quoted: *Bennett's Benjamin on Sales*, p. 25, § 20; and pp. 936-938, § 820.

6 40, 41 Vict. ch. 39, § 2 (1877).



- 7 Jones v. Hodgkins, 61 Me. 480.  
 8 Jones v. Hodgkins, 61 Me. 480; Bennett's Benjamin on Sales, p. 24, § 20, n. y. But see Bohn v. Cleaver, 25 La. An. 421.  
 9 40, 41 Vict. ch. 30, § 3 (1877).  
 10 Johnson v. Credit Lyonnais, Law R. 3 C. P. D. 32.  
 11 Johnson v. Credit Lyonnais, Law R. 3 C. P. D. 32. Nor was his vendee deemed debarred from setting up title against the pledgees: Johnson v. Credit Lyonnais, Law R. 3 C. P. D. 32. Case stated: Campbell on Sales, 416, 417.  
 12 Sheppard v. Union Bank of London, 7 Hurl. & N. 661; Baines v. Swainson, 4 Best & Smith, 270.  
 13 Kingsford v. Merry, 11 Ex. 577; 1 Hurl. & N. 503; Higgins v. Burton, 26 Law J. Ex. 342. See Bennett's Benjamin on Sales, p. 22, § 19, and p. 935, § 819, so stating these cases.

§ 210. **Apparent ownership or authority.**—*Bare possession insufficient.* Independently of the provisions of the statute in regard to dealings with agents and factors, the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods to the preclusion of the right of the real owner.<sup>1</sup> If he sells as owner, there must be some other *indicia* of property than mere possession.<sup>2</sup> There must be some act or conduct on the part of the real owner,<sup>3</sup> whereby the party selling is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party,<sup>4</sup> dealing on the faith of such appearances.<sup>5</sup>

*Right to sell, etc.* But where one of a firm of dealers in musical instruments, to whom the owners of a piano intrusted it for sale on commission, took the piano home, and after several months sold it, making no returns, it was held that the buyer being a purchaser in good faith and for value, took a good title from the agent, who was clothed not only with the possession of the piano, but also with the right to sell it, and had been allowed by the principals to treat it as his own property.<sup>6</sup>

*Ostensible authority and real power.* And a factor who has the possession and control of personal property has, under the California statute, ostensible authority, and therefore real power, to pledge the same as collateral security for a loan made to him by the pledgee, in good faith, in the ordinary course of business, and without notice of the principal's title.<sup>1</sup>

1 *Levi v. Booth*, 58 Md. 305, 314 ; 42 Am. Rep. 332, 337 ; fully discussing transfer of title by agents under and without factors' acts.

2 *Levi v. Booth*, 58 Md. 305, 315 ; 42 Am. Rep. 332, 337. And see *Covill v. Hill*, 4 Denio, 323, as quoted, *Barstow v. Savage Mining Co.* 64 Cal. 388 ; 49 Am. Rep. 705.

3 See *Pickering v. Busk*, 15 East, 38 ; *Johnson v. The Credit Lyonnais*, 2 C. P. Div. 224 ; 3 C. P. Div. 32.

4 See *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 ; as quoted, *Barstow v. Savage Mining Co.* 64 Cal. 388 ; 49 Am. Rep. 705.

5 *Levi v. Booth*, 58 Md. 305, 315 ; 42 Am. Rep. 332, 337.

6 *Dias v. Chickering*, 64 Md. 348 ; S. C. 21 The Reporter, 378 ; citing, *Hall v. Hinks*, 21 Md. 406 ; *Levi v. Booth*, 58 Md. 311, 312 ; 42 Am. Rep. 332 ; *Wharton on Agency*, §§ 101, 200.

7 *Wisp v. Hazard*, 66 Cal. 459.

## CHAPTER XVI.

## DOCUMENTS OF TITLE.

- § 211. Signification.
- § 212. Bills of lading.
- § 213. Nature and effect.
- § 214. Shipping receipts.
- § 215. Estoppel of ship-owners.
- § 216. Warehouse receipts.
- § 217. Documents of title.
- § 218. Statutory scope of term.
- § 219. Delivery orders.
- § 220. Dock warrants, etc.

§ 211. **Signification.**—*Instruments of authentication.* The convenient expression “documents of title,” used in legislation relating to factors and their disposition of goods, may be used to cover all those different instruments which authenticate the transfer of title or of possession, as bills of lading, warehouse receipts, and various instruments in the nature of delivery orders.<sup>1</sup>

*Objection to expression.* Objection has, however, been made to the expression, upon the ground that title to goods consists in facts, and contracts having the force of conveyances, while the documents which give warrant to demand the goods from the custodians, whether shipmasters, wharfingers, or warehousemen, are not, generally speaking, part of the title, although they are commonly accessories to the title.<sup>2</sup>

*When may constitute title.* But it is admitted that in certain cases they, along with other facts, constitute a title in the holder; and these cases are, *firstly*, when they are relied on under the principle of holding out;<sup>3</sup> *secondly*, under the same principle as extended by the factors’ acts;<sup>4</sup> and *thirdly*, by custom of trade, such as

that which enables the *bona fide* holder of bills of lading to defeat the vendor's right to stop *in transitu*.<sup>5</sup>

1 See 2 Schouler on Personal Property, §§ 392, 539, 556, notes. And consult §§ 217 and 218 of this chapter on DOCUMENTS OF TITLE and STATUTORY SCOPE OF TERM.

2 Campbell on Sales, 414, n. 1.

3 As in *Pickering v. Busk*, 15 East, 28.

4 See preceding chapter on FACTORS' ACTS.

5 Campbell on Sales, 414, n. 1. Stoppage *in transitu*: See subsequent chapter on that subject.

§ 212. **Bills of lading.**—*For symbolical delivery of goods.* Symbolical transfers of chattels not conveniently situated for manual delivery are effected by such acts under the law-merchant as the delivery of the bill of lading properly indorsed or assigned, or of an invoice as its substitute.<sup>1</sup>

*Seller's lien and documents of title.* And as the seller's lien is dependent upon possession, it is extinguished by delivery of the goods to the buyer,<sup>2</sup> whether actual or constructive.<sup>3</sup> But all documents accompanying title have not this full effect so as to divest the seller's lien.<sup>4</sup>

*Stoppage in transitu.* Nor will even the indorsement or assignment of a bill of lading deprive the owner of the right of stoppage *in transitu* where the rights of third parties have not intervened.<sup>5</sup>

*Unindorsed or unassigned bill of lading.* And the delivery of such a document as an unindorsed or unassigned bill of lading will not be equivalent in its effect to delivery of the goods.<sup>6</sup>

*Retransfer to consignor.* Where a bill of lading making the goods deliverable "to order or assigns," is transferred by the consignor and deposited as security for advances made by a third party, and then upon repayment of the advance, is transferred back to him by the third party, his original remedies under the contract are restored,<sup>7</sup> so as to enable him to sue for a breach committed before or after such retransfer of the bill.<sup>8</sup>

*In duplicate or triplicate.* Where bills of lading are given in duplicate or triplicate, according to a custom largely prevalent among merchants, it has been held that the party who first gets one bill of lading out of the set, gets the property which that set represents, and need not trouble himself about the subsequent bills of the set;<sup>9</sup> and that while a ship-owner or wharfinger who delivers the goods to the holder of a subsequent bill may be excusable, the fact of such delivery will not affect the ownership of the goods as between the holders of the two bills.<sup>10</sup>

*Reservation of jus disponendi.* The seller may restrain the effect of delivery by reserving the *jus disponendi*,<sup>11</sup> as by making out the bill of lading to himself or order.<sup>12</sup> And a consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned, by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact delivered.<sup>13</sup>

*Revocation of consignment.* A shipper may revoke a consignment after shipment made, and bill of lading signed, but before the bill of lading is delivered to the consignee.<sup>14</sup>

1 Lickbarrow v. Mason, 2 Term Rep. 63; 1 Smith's Leading Cases, 848; McEwan v. Smith, 2 H. L. Cas. 309; McKee v. Garcelon, 60 Me. 165; Gardner v. Howland, 2 Pick. 509, 602; Dows v. Greene, 24 N. Y. 633; Becker v. Hallgarten, 86 N. Y. 167; Conard v. Atl. Ins. Co. 1 Peters, 386; Gibson v. Stevens, 8 How. 399; The Vaughan, 14 Wall. 258. See for basis or support of foregoing matter, 1 Schouler on Personal Property, §§ 471, 472; 2 Schouler on Personal Property, § 556; Bennett's Benjamin on Sales, pp. 811, 812, § 697; Story on Sales, pp. 391, 392, § 343.

2 Parks v. Hall, 2 Pick. 206, 212.

3 Parks v. Hall, 2 Pick. 206, 212.

4 2 Schouler on Personal Property, § 556, whence next two paragraphs also derived.

5 See Lickbarrow v. Mason, 2 Term Rep. 63; 1 Smith's Leading Cases, 848; Peters v. Ballistier, 3 Pick. 495.

6 Stone v. Swift, 4 Pick. 389.

7 Short v. Simpson, Law R. 1 Com. P. 248.

8 Short v. Simpson, Law R. 1 Com. P. 248 ; 2 Schouler on Personal Property, 569, § 556, n.

9 Meyerstein v. Barber, Law R. 4 H. L. 317 ; Skillings v. Bollman, 6 Mo. App. 76.

10 Meyerstein v. Barber, Law R. 4 H. L. 317. And see Glyn v. East India Dock Co. 7 App. Cas. 159 ; 35 Eng. Rep. 414 ; and basis or support of foregoing matter in 2 Schouler on Personal Property, p. 569, § 556, n. ; Bennett's Benjamin on Sales, pp. 939-941, § 822, and pp. 990, 991, § 861 ; 2 Corbin's Benjamin on Sales, p. 1053, § 1224. Where the bill of lading delivered to the consignor differs from that kept by the master of the vessel, the former controls : Ontario Bank v. Hanlon, 23 Hun, 233 ; The Thames, 14 Wall. 98, 105. Duplicate bills and stoppage *in transitu* : Castanda v. Mo. Pac. Ry. Co. 24 Fed. Rep. 267.

11 See 2 Schouler on Personal Property, §§ 271-275, and p. 569, § 556 ; Craven v. Ryder, 4 Taunt. 433 ; Cowasjee v. Thompson, 5 Moore P. C. C. 165 ; Dodge v. Meyer, 61 Cal. 405, 417.

12 See 2 Schouler on Personal Property, § 273.

13 Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 366. See Dodge v. Meyer, 61 Cal. 405, 417. And the consignor who retains the bill of lading may order delivery to some person other than the consignee : Halsey v. Warden, 25 Kan. 128, 136.

14 West. Transp. Co. v. Hawley, 1 Daly, 327. And until then no title or right to possession or ownership passes from the owner or shipper : West. Transp. Co. v. Hawley, 1 Daly, 327.

§ 213. **Nature and effect.**—*Represent property.* Bills of lading by the law merchant are the representatives of the property for which they have been given.<sup>1</sup>

*Effect of transfer.* And the indorsement and delivery of a bill of lading transfers the property<sup>2</sup> from the vendor to the vendee ;<sup>3</sup> is a complete legal delivery of the goods ;<sup>4</sup> divests the vendor's lien ;<sup>5</sup> and though the contract is not at common law transferred to the assignee,<sup>6</sup> yet by statute in England,<sup>7</sup> it vests in the vendee all the vendor's rights of action against the ship-master, or owner.<sup>8</sup>

*Stoppage in transitu.* But though the vendor's lien is thus divested by reason of the complete delivery of the *indicia* of title,<sup>9</sup> yet the seller may, if the goods have not yet reached the actual possession of the buyer,<sup>10</sup> and if no third person has obtained rights by obtaining a transfer of the bill of lading from the buyer,<sup>11</sup> intercept the goods,<sup>12</sup> in the event of the buyer's

insolvency before payment,<sup>13</sup> by the exercise of the right<sup>14</sup> of stoppage *in transitu*.<sup>15</sup>

1 Bennett's Benjamin on Sales, p. 923, § 813. And see *Dodge v. Meyer*, 61 Cal. 405, 416. Even after goods are landed, until replaced by wharfinger's warrants: *Myerstein v. Barber*, Law R. 4 App. Cas. 317; Law R. 2 Com. P. 308, 361.

2 Though such indorsement is not essential to the transfer of title: See *First Nat. Bank v. Northern Railroad*, 58 N. H. 203; *City Bank v. Rome etc. R. R. Co.* 44 N. Y. 136; *Merch. Bank v. Union R. R. etc. Co.* 69 N. Y. 373; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Holmes v. Bailey*, 97 Pa. St. 57; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366. Sometimes otherwise under commercial code of German Empire: See *Becker v. Halgarten*, 86 N. Y. 167.

3 See *McKee v. Garcelon*, 60 Me. 167; *Robinson v. Stuart*, 68 Me. 61; *Davis v. Bradley*, 24 Vt. 55; *Same v. Same*, 28 Vt. 118; *Tilden v. Minor*, 45 Vt. 136; *Joslyn v. Grand Trunk R. R. Co.* 51 Vt. 921; *Peters v. Ballistier*, 3 Pick. 495; *Stone v. Swift*, 4 Pick. 389; *Hazard v. Fiske*, 33 N. Y. 287; *Stens v. Wabash Ry. Co.* 9 Ill. App. 48; *Royal Can. Bank v. Grand Trunk Ry. Co.* 23 Up. Can. C. P. 225; *Glyn v. East India Dock Co.* 5 Q. B. D. 129; 28 Week. R. 444; 35 Eng. Rep. 414. See, also, *Dodge v. Meyer*, 61 Cal. 405, 416. Transfer of title by bill of lading: *St. Paul Roller Mill Co. v. Great Western Dispatch Co.* 27 Fed. Rep. 434; under Louisiana Code, see *Allen v. Jones*, 24 Fed. Rep. 11.

4 See under chapter on DELIVERY.

5 See preceding section on BILLS OF LADING.

6 See *Stone v. Swift*, 4 Pick. 389.

7 See Bills of Lading Act, 18, 19 Vict. ch. 3; *The Freedom*, Law. R. 3 P. C. 594.

8 Bennett's Benjamin on Sales, p. 923, § 812, and pp. 928, 929, § 813, whence foregoing matter derived. Effect of indorsement of bills of lading in Canada to banks: *Goodenough v. City Bank*, 10 Up. Can. C. P. 51. Negotiability in Louisiana: *Henry v. Phila. Warehouse Co.* 81 Pa. St. 76.

9 See preceding section on BILLS OF LADING.

10 See under chapter on STOPPAGE IN TRANSITU.

11 See section under STOPPAGE IN TRANSITU, on MODE OF DEFEATING RIGHT.

12 See section under STOPPAGE IN TRANSITU, on MODE OF EXERCISING RIGHT.

13 See section on BUYER'S INSOLVENCY, etc., under STOPPAGE IN TRANSITU.

14 Bennett's Benjamin on Sales, p. 929, § 813; citing, *Lickbarrow v. Mason*, 2 Term Rep. 62; 1 Black. H. 357; 6 East, 20; 1 Smith's Leading Cases (ed. 1879), 753.

15 Nature of right: See first section of chapter on STOPPAGE IN TRANSITU. Duplicate bills of lading and stoppage *in transitu*: *Castanola v. Mo. Pac. Ry. Co.* 24 Fed. Rep. 297.

§ 214. **Shipping receipts.**—*Prerequisite to vesting of title in consignee.* The rule seems to be that in order to change the title to property shipped, and vest it in the

consignee, there must be a bill of lading, receipt, or letter of information forwarded to the consignee, or advances must have been made on the faith of the particular consignment.<sup>1</sup>

*Forwarded too late, etc.* But there is no transfer of title, risk, or possession where the shipping receipts for grain were not forwarded until after the grain was attached as the property of the consignor, and the advancements for which a lien was claimed by the consignees were all made before the grain in controversy was shipped.<sup>2</sup>

1 First Nat. Bank v. McAndrews, 5 Mont. 325 ; 51 Am. Rep. 51, 58.

2 Hodges v. Kimball, 49 Iowa, 577 ; following, Elliott v. Bradley, 23 Vt. 217 ; citing in support, Bank of Rochester v. Jones, 4 N. Y. 497 ; Winter v. Coit, 7 N. Y. 288 ; Kinloch v. Craig, 3 Term Rep. 119 ; reviewing and reconciling, Davis v. Bradley, 28 Vt. 118 ; Holbrook v. Wight, 24 Wend. 169 ; Grosvenor v. Phillips, 2 Hill, 147 ; Bailey v. Hudson River R. Co. 49 N. Y. 70 ; Haille v. Smith, 1 Bos. & P. 563 ; Krulder v. Elson, 47 N. Y. 36 ; distinguishing, Anderson v. Clark, 2 Bing. 20 ; Cuming v. Brown, 9 East, 506 ; Vertue v. Jewell, 4 Camp. 31 ; Patten v. Thompson, 5 Maule & S. 350 ; Wade v. Hamilton, 30 Ga. 450 ; Grove v. Brien, 8 How. 429 ; Bryans v. Nix, 4 Mees. & W. 774 ; Evans v. Nichol, 3 Man. & G. 614 ; Alderson v. Temple, 4 Burr. 2235 ; Berly v. Taylor, 5 Hill, 577.

‡ 215. *Estoppel of ship-owners.—English rule.* It is beyond the scope of the master's authority to sign a bill of lading for goods which have never been shipped ;<sup>1</sup> and in England, the ship-owner can set up such want of authority,<sup>2</sup> even as against one who has made advances on the faith of the bill,<sup>3</sup> except so far as this right may be affected by statutory regulation.<sup>4</sup>

*Like American view.* The English rule is followed<sup>5</sup> in Canada,<sup>6</sup> in the federal courts,<sup>7</sup> in Massachusetts,<sup>8</sup> and in Missouri.<sup>9</sup>

*Different American doctrine.* But the counter-view, that as against innocent third persons, the ship-owners are estopped to deny the bill of lading upon this point, is maintained in New York,<sup>10</sup> and in Illinois.<sup>11</sup>

1 Bennett's Benjamin on Sales, p. 930, ‡ 813, n. f.

2 According to source just cited.



3 Grant v. Norway, 10 Com. B. 665; Coleman v. Riches, 16 Com. B. 104; Hubbersty v. Ward, 8 Ex. 330.

4 Bills of Lading Act, 18, 19 Vlt. ch. 3, § 3; Jessel v. Bath, Law R. 2 Ex. 267; Brown v. Powell etc. Coal Co. Law R. 10 Com. P. 562.

5 According to Bennett's Benjamin on Sales, p. 930, § 813, n. f.

6 Eel v. Great West. Ry. Co. 5 Duval, 179.

7 The Lorn, 7 Blatchf. 244; Hickox v. Buckingham, 18 How. 182.

8 Sears v. Wingate, 8 Allen, 103; Walter v. Brewer, 11 Mass. 99.

9 Louisiana Nat. Bank v. Lavelle, 52 Mo. 380. Inclination toward same view: Lehman v. Central R. R. Co. 26 Alb. L. J. 389.

10 Meyer v. Peck, 28 N. Y. 590; Armour v. Mich. Cent. R. R. Co. 65 N. Y. 111; Miller v. Hannibal etc. R. R. Co. 90 N. Y. 430; 24 Hun, 607.

11 St. Louis R. R. Co. v. Larned, 103 Ill. 293. See Bennett's Benjamin on Sales, p. 930, § 813, n. f, for basis of this statement.

§ 216. **Warehouse receipts.**—*In England.* In many cases in the English courts it has been held that an assignment of a document of the character of a warehouse receipt, does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee.<sup>1</sup>

*Effect of local usages.* But local mercantile usage, so well recognized as to have presumably entered into the mutual agreement of parties, has a material bearing on the effect to be given to instruments accompanying the transfer of goods.<sup>2</sup>

*As documents of title.* And in the United States, warehouse receipts have in several instances, especially in sections largely concerned in inland transportation, been treated as documents of title to much the same extent as bills of lading.<sup>3</sup>

*Statutory regulation.* So local statutes sometimes specially provide<sup>4</sup> that any person to whom warehouse receipts are transferred by indorsement shall be deemed the owner, so far as to give validity to any pledge, lien, or transfer by him.<sup>5</sup>

*Negotiability.* Warehouse receipts are sometimes made negotiable by statute;<sup>6</sup> but usually a receipt of this character is not, in any technical sense, negotiable,<sup>7</sup>

and the delivery of the receipt, apart from any statute regulating the transfer, would have the same effect in transferring the title to the property, as the delivery of the property itself.<sup>8</sup> Thus, it is laid down that in the absence of statutory enactment a warehouse receipt is not a negotiable instrument, and an assignment thereof operates merely as a transfer of the property deposited, and passes no better title to the purchaser than the vendor had.<sup>9</sup>

*Bona fide purchaser of bonded goods.* Where brandy manufactured by the owner for a licensed distiller is stored in a United States bonded warehouse, in order to delay the payment of the revenue tax, and the laws governing the matter require brandy to be stored in a distiller's name, but do not require the distiller to be the owner, then if the warehouse receipt was issued to the distiller, and he subsequently sold the liquor to another, without authority, the latter, though a *bona fide* purchaser for value and without notice, acquired no title to the property, and the owner of the liquor was entitled to a return thereof on paying to such purchaser his payments for warehouse charges and the government tax.<sup>10</sup>

1 Davis v. Russell, 52 Cal. 611, 615. And see Blackburn on Sales, 297; Bennett's Benjamin on Sales, p. 931, § 815.

2 See 2 Schouler on Personal Property, p. 568, § 556, n.

3 Gibson v. Stevens, 8 How. 384; Shepardson v. Cary, 29 Wis. 34; 2 Schouler on Personal Property, § 556, note on p. 568, so citing these cases: Horr v. Baker, 8 Cal. 613; Davis v. Russell, 52 Cal. 611.

4 See Stims. Am. Stat. Law pp. 517-519, §§ 4370-4372, for analysis of enactments on this general subject.

5 Yenni v. McNamee, 45 N. Y. 614; N. Y. Laws, 1858, ch. 326; as cited, 2 Schouler on Personal Property, p. 568, § 556, n. And see Mass. Pub. Stats. ch. 72, § 1; Rev. Stats. Ill. 1880, ch. 114, § 142; Burton v. Curyea, 40 Ill. 320; Bennett's Benjamin on Sales, p. 932, § 815, n. m.

6 Thus in Kentucky, under the statute, with certain conditions, the transfer of the receipt passes the property in the goods: See Cochran v. Ripy, 13 Bush, 495, 502. But even though the statute confer negotiable qualities on such instruments, it could not fairly render the warehouseman a guarantor of the title of property placed in his custody: Insurance Co. v. Kiger, 103 U. S. 352; as cited, 1

Schouler on Personal Property (2d ed.), § 472. What not a warehouse receipt under statute as to negotiable instruments: See *State v. Bryant*, (63 Md.) 32 Alb. L. J. 197; 19 The Reporter, 461.

7 *Allen v. Maury*, 66 Ala. 10. It merely stands in the place of the property represented by it: *Allen v. Maury*, 66 Ala. 10. Warehouse receipts made payable to bearer are not negotiable; but they require a written indorsement and delivery: 1 Schouler on Personal Property, § 472, n. 1; citing, 6 Mo. App. 172.

8 *Allen v. Maury*, 66 Ala. 10. In other words, the delivery of such *indicia* of title is usually regarded as a symbollic delivery of the property itself: *Allen v. Maury*, 66 Ala. 10. Same effect: Second Nat. Bank v. Walbridge, 19 Ohio St. 424; *Whitlock v. Hay*, 58 N. Y. 484. See Bennett's Benjamin on Sales, p. 932, § 815, n. m, partial source of foregoing matter, referring for Canadian views to *Glass v. Whitney*, 22 Up. Can. Q. B. 290; *In re Coleman*, 36 Up. Can. Q. B. 559; *Parsons v. Queen Ins. Co.* 29 Up. Can. C. P. 188, 210, 211. Consult further, *Gill v. Frank*, 12 Or. 507; distinguishing, *Solomons v. Bushnell*, 11 Or. 277; and quoting with approval, *Hallgarten v. Oldham*, 135 Mass. 1.

9 *Solomon v. Bushnell*, 11 Oreg. 277; quoting, *Burton v. Curyea*, 40 Ill. 327; stating, *Hale v. Milwaukee Dock Co.* 29 Wis. 485; and citing, also, *Lickbarrow v. Mason*, 2 Term Rep. 63; 1 Smith's Leading Cases (7th Am. ed.), 1198; Second Nat. Bank v. Walbridge, 19 Ohio St. 419; *Ins. Co. v. Kiger*, 103 U. S. 356.

10 *Bliss v. Carroll*, 9 Pacif. Rep. (Cal.) 88; S. C. 21 The Reporter, 140; Sup. Ct. Cal. Dec. 23, 1885.

§ 217 Documents of title.—*Enactments concerning.* Various acts of legislation have been passed, both in England and America, which for certain purposes therein specified, preserve or destroy liens, or give certain classes of documents of title a *quasi* negotiable character;<sup>1</sup> and prominent among such statutes are the English Factors' Acts<sup>2</sup> and Bills of Lading Act,<sup>3</sup> whose features are followed in this country in the codes of some of the States.<sup>4</sup>

*Assimilation to bills of lading.* And among other changes effected by the latest English Factors' Acts<sup>5</sup> all documents of title, when in the hands of a *bona fide* transferee for value from the original purchaser, are assimilated to bills of lading, for the purpose of defeating the seller's lien and stoppage *in transitu*.<sup>6</sup>

*Protection of pledgee, etc.* So the effect of the late English statutes is to now enable not only the *bona fide* buyer of goods under indorsement of the bill of lading, but also a party who loans or advances money upon

the faith of such security,<sup>7</sup> to prevail in title over the original seller who has actually transferred the document, and suffered it to go into the market.<sup>8</sup>

*Lost or stolen documents.* But one who buys or advances on the faith of these documents of title, does not so far stand in the same position as the innocent holder for value of a genuine bill of exchange or promissory note, as to be able to claim the goods when the document came to him through a finder or thief who had no right thereto.<sup>9</sup>

*Misdescription in.* And in the absence of legislation, usage, or express agreement, it seems that nothing is to be delivered up under the document but the goods which it actually represents, whatever error of description not of a fraudulent character may be made in the document.<sup>10</sup>

1 2 Schouler on Personal Property, p. 568, § 55, upon which paragraph based.

2 4 Geo. 4, ch. 83, § 3; 6 Geo. 4, ch. 94; 5, 6, Vict. ch. 39; 40, 41, Vict. ch. 39. See Bennett's Benjamin on Sales, pp. 922, 926, § 809; Campbell on Sales, 412.

3 18, 19, Vict. ch. 111; Bennett's Benjamin on Sales, p. 928, § 812; Campbell on Sales, 66; Barber v. Meyerstein, Law R. 4 H. L. 317; Jessel v. Bath, Law R. 2 Ex. 267.

4 See Dows v. Greene, 24 N. Y. 638; Hale v. Milwaukee Dock Co. 29 Wis. 482.

5 40, 41, Vict. ch. 39 (1877). See Bennett's Benjamin on Sales, p. 926, § 809 a; Campbell on Sales, 417, 419.

6 2 Schouler on Personal Property, p. 568, § 556, n.

7 See § 205, on LIMITATIONS ON EXEMPTION OF BONA FIDE PURCHASER.

8 Short v. Simpson, Law R. 1 Com. P. 248; Barber v. Meyerstein, Law R. 4 H. L. 317; Pease v. Gloahac, Law R. 1 P. C. 219, as noted; 2 Schouler on Personal Property, p. 568, § 556, n.

9 Gurney v. Behrend, 3 El. & B. 622; Stollenwerck v. Thacher, 115 Mass. 224; Blackburn on Sales, 279; as cited, 2 Schouler on Personal Property, p. 568, § 556, n.

10 Jessel v. Bath, Law R. 2 Ex. 267 (weight wrongly expressed); Hale v. Milwaukee Dock Co. 29 Wis. 482 ("salt pork" described as "mess pork"). See 2 Schouler on Personal Property, p. 563, § 556, n., making these citations in support of text.

§ 218. *Statutory scope of term.*—*Under English Factors' Acts.* Documents of title under the English Fac-

tors' Acts,<sup>1</sup> are stated to include bills of lading, India warrants, dock warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods.<sup>2</sup>

*Cash receipts.* But the suggestion has been repudiated that cash receipts given by vendees to their sub-purchasers, upon the presentation of which the latter received the goods from the master of the ship in which the goods lay, were documents of title as equivalent to delivery orders.<sup>3</sup>

1 Expression criticised : Campbell on Sales, 414.

2 5, 6, Vict. ch. 39, § 4. Or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented : 5, 6, Vict. ch. 39, § 4.

3 *Kemp v. Falk*, 7 App. Cas. 573, 584. See Bennett's Benjamin on Sales, p. 994, § 863, n. h.

§ 219. *Delivery orders.—Nature and effect.* Independently of legislation in England, the indorsement of of such instruments as delivery orders has no effect there beyond that of an authority to receive possession :<sup>1</sup> and what are known as delivery warrants, wharfingers' certificates, and the like, have been pronounced to be no documents of title representing the goods<sup>2</sup> in any such sense, even with reference to third parties, as to be sufficient to carry the complete property and possession out of the seller.<sup>3</sup> Thus, in the case of delivery orders, as meaning orders given by the vendor on a bailee who holds possession as agent of the vendor, the delivery is not complete until the bailee attorns to the buyer.<sup>4</sup>

*Indorsement to sub-vendee.* And a delivery order has been regarded as differing in effect from a bill of lading,<sup>5</sup> so that prior to the latest of the factors' acts,<sup>6</sup> its indorsement by a vendee to a sub-vendee might not affect the lien of the original vendor.<sup>7</sup>

1 Blackburn on Sales, 297. A delivery order differs from a bill of lading in not taking away the right of the vendor to prevent the delivery of the goods: *McEwan v. Smith*, 2 H. L. Cas. 309.

2 See 2 Schouler on Personal Property, p. 567, § 556, n., whence paragraph derived.

3 *Farina v. Home*, 16 Mees. & W. 119; *Gunn v. Bolckow*, Law R. 10 Ch. 491; *McEwan v. Smith*, 2 H. L. Cas. 309. See 2 Schouler on Personal Property, § 392; Story on Sales, p. 396, § 344; *Shepardson v. Cary*, 29 Wis. 34.

4 Bennett's Benjamin on Sales, p. 930, § 814 (basis of this and next paragraph). And thus becomes the latter's agent as custodian of the goods: Bennett's Benjamin on Sales, pp. 191, 193, §§ 174, 177. See, also, *Deady v. Goodenough*, 5 Up. Can. C. P. 163. Showing without surrendering insufficient to require warehouseman to part with goods: *Bartlett v. Holmes*, 13 Com. B. 630; 22 Law J. Com. P. 182.

5 See citations in note after next.

6 40, 41 Vict. ch. 39, § 5 (1877).

7 *McEwan v. Smith*, 2 H. L. Cas. 309; *Griffiths v. Perry*, 1 El. & E. 680, 28 Law J. Q. B. 208.

§ 220. **Dock warrants, etc.** — *Distinguished from bills of lading.* Dock warrants and warehouse warrants or certificates have also been regarded as differing from bills of lading in concerning goods, on land, of which possession can be taken, and in not being ancient documents subject to the law merchant.<sup>1</sup>

*Effect of indorsement.* Hence, it is declared that the indorsement of a delivery order or dock warrant has not, independently of the factors' acts, any effect beyond that of a token of an authority to receive possession.<sup>2</sup>

1 Blackburn on Sales, 297. But see *Davis v. Russell*, 52 Cal. 611, 615.

2 Blackburn on Sales, 297; *Farina v. Home*, 16 Mees. & W. 119. And see *Mottram v. Heyer*, 5 Denio, 630; *Southwest Freight Co. v. Stanard*, 44 Mo. 71; *Burton v. Curyea*, 40 Ill. 320; *Chicago Dock Co. v. Foster*, 48 Ill. 507; Bennett's Benjamin on Sales, pp. 931-935, §§ 815-817, basis of foregoing matter. Conversion by pledgee delivering dock warrant to vendee under premature sale: *Johnson v. Stear*, 15 Com. B. N. S. 330; 33 Law J. Com. P. 130.

## CHAPTER XVII.

## DELIVERY.

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- § 223. Seller's custody.
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- § 225. Delivery and payment concurrent.
- § 226. Credit sale.
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- § 228. Duty to deliver.
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- § 239. Mode of making.
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- § 248. Delivery to carrier.
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- § 250. Directions concerning transportation.
- § 251. Delivery to warehouseman.
- § 252. Inspection and acceptance.
- § 253. Delivery to pass title.
- § 254. Various points concerning delivery.

§ 221. **Scope of term.** — *In pursuance of contract.* The transfer of personal property is effected by an executed contract, consisting of a contract or agreement on the

terms of sale, by the parties or their agents, and a delivery, actual or constructive, pursuant to the terms of such agreement.<sup>1</sup>

*As denoting transfer of title and of possession.* But the term "delivery" is used in the law of sales in very different senses.<sup>2</sup> It is used in turn to denote transfer of title,<sup>3</sup> and transfer of possession.<sup>4</sup>

*Appropriation of chattel.* And where the parties have agreed, and the specific articles are appropriated and accepted, then, independently of the statute of frauds,<sup>5</sup> it is often said there is sufficient delivery to pass the title, although there be no transfer of possession.<sup>6</sup> And this must be so in order to be consistent with the lien<sup>7</sup> which remains to the vendor for the price.<sup>8</sup> So it has been said that when by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the specific chattel and pay the stipulated price, the parties are then in the same position they would be in after a delivery in pursuance of a general contract.<sup>9</sup>

*In relation to statute of frauds.* The courts also make reference to the delivery sufficient to take an oral agreement for the sale of goods out of the statute of frauds,<sup>10</sup> although the statute is silent as to the delivery of goods sold, which is the act of the seller, but requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer.<sup>11</sup>

*As including receipt.* And delivery as applied to a change of possession in pursuance of a sale, is said to ordinarily include both the act of the vendor in transferring the property, and that of the vendee in receiving it.<sup>12</sup>

1 Farlow v. Ellis, 15 Gray, 229 ; Langdell's Cases on Sales, 720, 722.

2 Morse v. Sherman, 106 Mass. 430, 433. And see Messer v. Woodman, 22 N. H. 172 ; 53 Am. Dec. 241, 247. Delivery in contracts is the transfer of the possession of a thing from one person to another : 1



Bouvier Law Dict. (15th ed.) 502. In respect to sales, delivery is defined in Louisiana as the transferring of the thing sold into the power and possession of the buyer: La. Code, art. 2452; *Lambeth v. Wells*, 12 Rob. (La.) 51, 54.

3 Transfer of title generally: See preceding chapter on subject.

4 *Morse v. Sherman*, 106 Mass. 430, 433. Delivery "ex vessel" claimed under contract: *Cunningham v. Judson* (N. Y.) 2 N. E. Rep. 915.

5 Statute of frauds generally: See subsequent chapter on that subject.

6 *Morse v. Sherman*, 106 Mass. 430, 433. And consult *Brazier v. Ansley*, 11 Ired. 12; 51 Am. Dec. 408, 409.

7 Seller's lien generally: See subsequent chapter on that subject.

8 *Morse v. Sherman*, 106 Mass. 430, 433. See *Simmons v. Swift*, 2 Barn. & C. 540; *Langdell's Cases on Sales*, 656, 663; *Riddle v. Varnum*, 20 Pick. 280, 285. Marked distinction between delivery to pass title and to destroy seller's lien: *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 756. And compare *Messer v. Woodman*, 22 N. H. 172; 53 Am. Dec. 241, 247.

9 *Dixon v. Yates*, 5 Barn. & Adol. 313; *Ross' Leading Cases*, 55, 75. For the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession: *Dixon v. Yates*, 5 Barn. & Adol. 313. See *Morse v. Sherman*, 106 Mass. 430, 433. And consult *Brazier v. Ansley*, 11 Ired. 12; 51 Am. Dec. 408, 409.

10 See *Marsh v. Hyde*, 3 Gray, 331, 332; *Langdell's Cases on Sales*, 313; *Demon v. Osborn*, 1 Pick. 476, 480; 11 Am. Dec. 229; *Messer v. Woodman*, 22 N. H. 172; 53 Am. Dec. 241, 242.

11 *Boardman v. Spooner*, 13 Allen, 353, 357; *Langdell's Cases on Sales*, 610.

12 *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446, 453.

§ 222. **Actual and constructive delivery.**—*Statement of distinction.* Actual or real delivery is the transfer of the commodity sold to the recipient, while constructive or symbolical delivery may be made with equal effect, at least between buyer and seller, by a transfer of some article which is a symbol or evidence of ownership,<sup>1</sup> such as the delivery of the key of a warehouse containing the goods sold, or of the bill of lading of goods at sea, or of a bill of sale of a vessel at sea.<sup>2</sup>

*Further exposition of difference.* So it has been laid down that actual delivery consists in the giving real possession of the thing sold to the vendee or his servants or special agents, who are identified with him, and

represent him ;<sup>3</sup> while constructive delivery is a general term, comprehending all those acts which, although not truly conferring on the vendee a real possession of the thing sold, have been held *constructione juris*, equivalent to acts of real delivery.<sup>4</sup>

1 1 Abbott's Law Dict. 360. Delivery need not be actual, but constructive delivery may be inferred from a variety of facts: See Ga. Code of 1882, § 2644; Stims. Am. Stat. Law, § 4567, p. 544.

2 1 Abbott's Law Dict. 360. And see *Lambeth v. Wells*, 12 Rob. (La.) 51; La. Code, art. 2453. Or of a warehouse receipt: See *Newcomb v. Cabell*, 10 Bush, 460, 469.

3 *Bolin v. Huffnagle*, 1 Rawle, 9, 19. Actual possession exists where the thing is in the immediate occupancy of the party: *Brown v. Valkening*, 64 N. Y. 80; as quoted, *Winfield's Words* etc. 17.

4 *Bolin v. Huffnagle*, 1 Rawle, 9, 19. In this sense constructive delivery includes symbolical delivery, and all those *traditiones fictæ*, which have been admitted into the law as sufficient to vest the absolute property in the vendee, and bar the rights of lien and stoppage *in transitu*, such as marking and setting apart the goods as belonging to the vendee, charging him with warehouse rent, etc.: *Bolin v. Huffnagle*, 1 Rawle, 9, 19. Constructive possession is that which exists in contemplation of law, without actual personal occupation: *Winfield's Words*, etc. 139; quoting, *Brown v. Valkening*, 64 N. Y. 80.

§ 223. *Seller's custody.*—*Goods not taken away by buyer.*—It is said that when the contract of sale is complete, and the vendee does not take away the goods, the vendor may recover the price<sup>1</sup> in *indebitatus assumpsit*,<sup>2</sup> as the law does not require therefor that complete delivery or that actual receipt, which would be necessary to defeat the vendor's lien for the price,<sup>3</sup> or his right of stoppage *in transitu*,<sup>4</sup> or which would be required to take the case out of the statute of frauds.<sup>5</sup>

*Later statement of law.* And more recently it has been declared that there may be a bargain and sale of goods, sufficient to transfer the title, and thus to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession.<sup>6</sup> For the transfer of title is quite consistent with the vendor's retaining a lien for the price, and so retaining possession till the price is paid.<sup>7</sup>

- 1 See *Damon v. Osborn*, 1 Pick. 476, 481.
- 2 *Morse v. Sherman*, 106 Mass. 430, 432; citing, *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692; distinguishing, *Atwood v. Lucas*, 53 Me. 508. And see *Parsons v. Dickinson*, 11 Pick. 352, 354.
- 3 Seller's lien generally: See subsequent chapter on that subject.
- 4 Stoppage *in transitu* generally: See later chapter of book.
- 5 *Morse v. Sherman*, 106 Mass. 430, 432. Statute of frauds in general: See subsequent chapter on that subject.
- 6 *Frazier v. Simmons*, 139 Mass. 531, 535.
- 7 *Frazier v. Simmons*, 139 Mass. 531, 535; citing, *Morse v. Sherman*, 106 Mass. 430, 432; *Haskins v. Warren*, 115 Mass. 514, 533; *Safford v. McDonough*, 120 Mass. 290; *Arnold v. Delano*, 4 Cush. 33, 38; 50 Am. Dec. 754; *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659; 2 Kent Com. 492.

§ 224. **Transfer of title without delivery.**—*In England.* It is now well settled<sup>1</sup> that by the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties;<sup>2</sup> so that the sale of a specific chattel passes the property in it to the vendee without delivery.<sup>3</sup> All that is essential to the sale of a chattel at common law is the agreement of the parties that the property in the subject-matter shall pass from the vendor to the vendee for a consideration given or promised to be given by the vendee.<sup>4</sup>

*In United States.* And in this country it is the general rule that a sale of personal property is complete by the mere consent of the parties and without delivery,<sup>5</sup> at least as between the parties.<sup>6</sup> So soon as a bargain of sale of personal goods is struck, the contract becomes absolute, without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer.<sup>7</sup>

*Right of possession.* But though the vendee in the case of a bargain of sale acquires the right of property in the thing sold, yet the payment of the price is a precedent condition implied in the contract, and the payment or tender thereof alone entitles him to the possession.<sup>8</sup>

*Delivery as passing title.* It is also sometimes declared, though in speaking of the execution of the contract, that without delivery, the title does not vest in the vendee so as to enable him to make title to a third party.<sup>9</sup> And in Pennsylvania, it is said that the only exceptions to the rule that upon a sale of personalty the title passes by delivery,<sup>10</sup> are where the sale is for cash and the delivery is upon condition that the payment be made as a concurrent act,<sup>11</sup> and where the delivery is without condition, but is procured by fraud or artifice<sup>12</sup> on the part of the purchaser.<sup>13</sup>

*Under Louisiana law.* Under the law of Louisiana, also, a contract of sale is perfect as between the parties, from the moment of valid agreement, and operates to vest property in the vendee, even though there has been no delivery.<sup>14</sup> And although, in the absence of delivery, such sales are without effect as against seizing or attaching creditors of the vendor and his *bona fide* transferees in possession and without notice, yet the vendee's title is not affected by the vendor's mere surrender in insolvency to his creditors.<sup>15</sup>

1 See *Morse v. Sherman*, 106 Mass. 430, 433.

2 *Gilmour v. Supple*, 11 Moore P. C. C. 551, 556; *Langdell's Cases on Sales*, 624, 632; *Calcutta Co. v. De Mattos*, 32 Law J. Q. B. 326, 329. And see *Simmons v. Swift*, 5 Barn. & C. 857; *Langdell's Cases on Sales*, 659, 662; *Tarling v. Baxter*, 6 Barn. & C. 360; *Ross' Leading Cases*, 1, 4; 1 *Langdell's Cases on Sales*, 621, 623.

3 *Dixon v. Yates*, 5 Barn. & Adol. 313; *Ross' Leading Cases*, 55, 74. And see *Hinde v. Whitehouse*, 7 East, 553; *Langdell's Cases on Sales*, 102, 110; *Noy's Maxims*, 88; 2 *Blackst. Com.* 448; *Wade v. Moffitt*, 21 Ill. 110, 111, 112; 74 Am. Dec. 79.

4 *Newcomb v. Cabell*, 10 Bush, 460, 468; quoting, *Parsons on Contracts* p. 435. And see *Wade v. Moffitt*, 21 Ill. 110, 111; 74 Am. Dec. 79. Compare, however, *Gardner v. Howland*, 2 Pick. 599, 602.

5 See *Taylor v. Twenty-Five Bales of Cotton*, 26 La. An. 247. Delivery not necessary to sale: *Nance v. Metcalf*, 1 West Rep. (Mo.) 441, 442, 443. Compare *contra*, declarations in *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720, 722.

6 See *Ricker v. Cross*, 5 N. H. 570, 571; *Bradeen v. Brooks*, 22 Me. 463, 470; *Puckett v. Reed*, 31 Ark. 131, 136; *Hooben v. Bidwell*, 16 Ohio, 509, 511; *Wade v. Moffitt*, 21 Ill. 110, 111, 112; 74 Am. Dec. 79, reviewing the cases.

7 *Willis v. Willis*, 6 Dana, 48; citing, 2 Kent Com. 492. And see *Wade v. Moffitt*, 21 Ill. 110, 112; 74 Am. Dec. 79; *Potter v. Coward*, Meigs, 22, 26; *Wing v. Clark*, 24 Me. 366, 372. Delivery not necessary to pass title: See *Pierce v. Moore*, 1 Tex. App. (Civ. Cas.) § 911; *Anderson v. Levyson*, 1 Tex. App. (Civ. Cas.) § 927. Delivery to pass risk: to cotton "free on board": *Hobart v. Littlefield*, 13 R. I. 341; though seller to pasture lambs, *Bertelson v. Bowers*, 81 Ind. 512; though wood not measured or paid for, *Upton v. Holmes*, 51 Conn. 500. Until delivery, shrinkage at risk of seller: *Gilman v. Andrews*, 20 The Reporter (Mich.) 180.

8 *Willis v. Willis*, 6 Dana, 48, 49. And it is said that though the property passes by a bargain without delivery, yet the vendee has no right of possession until delivery, which cannot be obtained till payment is made, or the other terms of sale complied with: *Barnes v. Bartlett*, 15 Pick. 71, 77.

9 *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720, 722.

10 Delivery to pass title: *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30.

11 Delivery and payment concurrent: See § 225.

12 See *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 180; § 205, on LIMITATIONS UPON EXEMPTION, in chapter on BONA FIDE PURCHASERS.

13 *Logan v. Smith*, 14 Phila. 114, citing various cases.

14 *Nicolopulo v. His Creditors*, 37 La. An. 473. And see La. Code art. 2456.

15 *Nicolopulo v. His Creditors*, 37 La. An. 472.

§ 225. *Delivery and payment as concurrent.*—*Contemporaneous character.* Where the contract makes no special provision on the subject, the payment for and receipt of the property are contemporaneous acts,<sup>1</sup> and the rights of the parties in this respect are reciprocal.<sup>2</sup> In such cases a vendor can never be compelled to part with his property without payment,<sup>3</sup> nor the vendee to pay for the same without receiving it.<sup>4</sup>

*Allegations of readiness, etc.* And the vendor cannot insist on payment of the price, without alleging that he is ready and willing to deliver the goods,<sup>5</sup> nor can the buyer demand delivery of the goods, without alleging that he is ready and willing to pay the price.<sup>6</sup>

1 The promise to deliver involved in an agreement of sale, and the promise to pay the purchase money, are mutually dependent, and neither party is bound to perform without contemporaneous performance by the other: *Haskins v. Warren*, 115 Mass. 533; as noted, *Bennett's Benjamin on Sales*, § 677, p. 785, n. f.

2 *Phelps v. Hubbard*, 51 Vt. 489, 493.

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3 Delivery not required before payment: *Lapene v. Badeaux*, 19 The Reporter (La.) 308.

4 *Phelps v. Hubbard*, 51 Vt. 489, 493. Delivery and payment concurrent conditions: See Bennett's Benjamin on Sales, § 677, p. 785, n. f; and 2 Corbin's Benjamin on Sales, § 1016, n. 2; citing following cases: *Mich. Cent. R. R. Co. v. Phillips*, 60 Ill. 190; *Barnes v. Bartlett*, 15 Pick. 77; *Knight v. New England Worsted Co.* 2 Cush. 271, 288; *Scudder v. Bradbury*, 106 Mass. 422, 427; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Goodwin v. Bost. etc. R. R.* 111 Mass. 487; *Haskins v. Warren*, 115 Mass. 533; *Freeman v. Nichols*, 116 Mass. 309; *Southw. Freight Co. v. Plant*, 45 Mo. 517; *West. Transp. Co. v. Marshall*, 4 Abb. N. Y. App. 575; *Tipton v. Feltner*, 20 N. Y. 423; *Mackanness v. Long*, 85 Pa. St. 153; *Leonard v. Davis*, 1 Black. 476; *McCann v. Kirlin*, 3 Allen N. B. 345; *Platt v. McFaul*, 4 Up. Can. C. P. 293; *Moore v. Logan*, 5 Up. Can. C. P. 294; *Phippen v. Stickney*, 19 Up. Can. C. P. 416; *Butters v. Stanley*, 21 Up. Can. C. P. 402; *Hancock v. Gibson*, 3 Up. Can. Q. B. 41; *Wright v. Weed*, 6 Up. Can. Q. B. 140; *Hefferman v. Berry*, 32 Up. Can. Q. B. 518.

5 See citations in next note.

6 Bennett's Benjamin, § 677, p. 786, n. g; citing, *Toledo etc. Ry. Co. v. Gilvin*, 81 Ill. 511; *Haskins v. Warren*, 115 Mass. 533; *Chapin v. Potter*, 1 Hilt. 366, 376; *Pierson v. Hoag*, 47 Barb. 244; *Whitcomb v. Hungerford*, 42 Barb. 177; *Fleeman v. McKean*, 25 Barb. 474; *Conway v. Bush*, 4 Barb. 564; *McDonald v. Hewlett*, 15 Johns. 349; *Hancock v. Gibson*, 3 Up. Can. Q. B. 41.

### § 226. Credit sale.—*Delivery under promise to pay.*

A sale may be as complete, and the title to a chattel pass as fully, in consideration of a promise to pay, as by an actual payment, when possession is given.<sup>1</sup> And if a vendor relies on the promise of the vendee to perform the conditions of the sale, and delivers the goods absolutely, the right of property will be changed, although the conditions never be performed.<sup>2</sup> For wherever there has been absolute delivery pursuant to a bargain perfect in its members, the ownership of the property is vested by it.<sup>3</sup>

*Buyer's right of possession.* But though, where the sale is upon credit, and nothing is agreed upon as to the time of delivering the chattel, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him,<sup>4</sup> yet his right of possession is not absolute, but is liable to be defeated if he becomes insolvent before he obtains possession.<sup>5</sup>

1 *Mackanness v. Long*, 85 Pa. St. 158, 163.

2 *Harris v. Smith*, 3 Serg. & R. 21 (sale by auction); as stated in *Mackanness v. Long*, 85 Pa. St. 158, 162, declaring that this was held to be a general rule in *Scott v. Wells*, 6 Watts & S. 357.

3 *Mackanness v. Long*, 85 Pa. St. 158, 162.

4 *Bloxam v. Sanders*, 4 Barn. & C. 941; *Ross' Leading Cases*, 48.

5 *Bloxam v. Sanders*, 4 Barn. & C. 941; *Ross' Leading Cases*, 48; citing, *Tooke v. Hollingsworth*, 5 Term Rep. 215.

§ 227. **Delivery under expectation of payment.**—*Waiver by absolute delivery.* Payment of the price is the condition<sup>1</sup> upon which alone the purchaser can require the seller to complete the sale by delivery of the property.<sup>2</sup> But it is so at the option of the seller, and if he proceeds to deliver without insisting upon payment, and without qualifying the act in some way, the condition or mutual dependence is waived or severed,<sup>3</sup> the contract is executed finally on his part, and he retains no lien upon the property.<sup>4</sup>

*Seller's right to reclaim goods.* If, however, the delivery and payment are to be simultaneous, and the goods are delivered in the expectation that the price will be immediately paid, the refusal to make payment will be such a failure on the part of the purchaser to perform the contract as to entitle the vendor to put an end to it and reclaim the goods.<sup>5</sup>

1 Conditions generally: See 1 *Bouvier's Law Dict.* (14th ed.) 312. And see under chapter on **CONDITIONAL SALES**.

2 *Haskins v. Warren*, 115 Mass. 533.

3 See *Smith v. Lynes*, 1 Seld. 41; *Langdell's Cases on Sales*, 724, 725.

4 *Haskins v. Warren*, 115 Mass. 533. Delivery of possession unqualified, is a release or waiver of his right, whether it be in the nature of a condition affecting the title or only a lien for the price: *Haskins v. Warren*, 115 Mass. 533. So quoted, *Bennett's Benjamin on Sales*, § 677, p. 785, n. f. And consult *Story on Sales*, § 313, p. 345; *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720, 722.

5 *Paul v. Reed*, 52 N. H. 136, 138; *Bennett's Benjamin on Sales*, § 677, p. 786, n. f.; citing, also, *Beauchamp v. Archer*, 58 Cal. 431; 41 Am. Rep. 266; *Owens v. Weedman*, 82 Ill. 409; *Deshon v. Bigelow*, 8 Gray, 159; *Marston v. Baldwin*, 17 Mass. 606; *Ferguson v. Clifford*, 37 N. H. 86; *Luey v. Bundy*, 9 N. H. 302; *Palmer v. Hand*, 13 Johns. 434; 7 Am. Dec. 392; *Leven v. Smith*, 1 Denio. 571; *Conway v. Bush*, 4 Barb. 564; *Miller v. Jones*, 66 Barb. 148; *Gardner v. Clark*, 21 N. Y.

399; *Hill v. McKenzie*, 3 *Thomp. & C.* 122; *Hodgson v. Barrett*, 33 *Ohio St.* 63; 31 *Am. Rep.* 527; *Leedom v. Phillips*, 1 *Yeates*, 527; *Harris v. Smith*, 3 *Serg. & R.* 20; *Henderson v. Lauck*, 21 *Pa. St.* 359; *Riley v. Wheeler*, 42 *Vt.* 528; *Adair v. Malone*, 1 *Hud. & B.* 49. Consult, also, *Story on Sales*, § 13, p. 344.

§ 228. *Duty to deliver.—Not in absence of agreement.* The seller, in the absence of a contrary agreement, is not bound to send or carry the goods to the buyer;<sup>1</sup> but it is enough that he stands ready to deliver them whenever the buyer sends for them, and that he offers no improper obstruction to their removal.<sup>2</sup>

*Goods not taken by buyer.* Hence, in the absence of any agreement, express or implied, as to delivery by the seller, the buyer must come and take the property bought by him at the place where it is when sold,<sup>3</sup> and if the seller has not agreed to deliver, he may sue for the price, though the goods remain in his possession;<sup>4</sup> but the recovery in such cases is on the common counts for goods bargained and sold,<sup>5</sup> as delivery is essential to support the count for goods sold and delivered.<sup>6</sup>

*Under agreement.* But the contract may be, and frequently is, such as requires the seller to forward the goods to the buyer;<sup>7</sup> and notice to deliver will be requisite,<sup>8</sup> if the parties have mutually manifested an intention that the seller shall make delivery conditional upon the performance of certain acts by the buyer.<sup>9</sup>

1 See citations in next note. And consult 2 *Corbin's Benjamin on Sales*, § 1018, n. 6; *Campbell on Sales*, 277.

2 2 *Schouler on Personal Property*, § 384; citing, *Bennett's Benjamin on Sales*, § 679; *Story on Sales*, §§ 300, 301; 2 *Kent Com.* 505. It is enacted in California that one who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon: *Cal. Civ. Code*, § 1753. See *Stims. Am. Stat. Law*, p. 544, § 4566; citing, also, *Dak. Civ. Code*, §§ 997-999. Demand held unnecessary: *Wagers v. Dickey*, 17 *Ohio*, 439; 49 *Am. Dec.* 467, 468.

3 1 *Corbin's Benjamin on Sales*, § 325, and notes, citing nearly all authorities stated in paragraph. And see § 223, on *SELLER'S CUSTODY*.

4 See *Bissell v. Balcom*, 39 *N. Y.* 275, 279; *Wade v. Moffitt*, 21 *Ill.* 120; 74 *Am. Dec.* 79; *Kohl v. Lindley*, 39 *Ill.* 195.



5 See citations in next note. And consult *Morse v. Sherman*, 106 Mass. 430, 432; *Frazier v. Simmons*, 139 Mass. 531, 535.

6 1 Chitty on Pleading, 345, 347; *Stearns v. Washburn*, 7 Gray, 187, 189; *Turner v. Langdon*, 112 Mass. 265; *Allingham v. O'Maheney*, 1 Pugs. 326.

7 See Story on Sales, § 302.

8 It is enacted in California that when either party to a contract of sale has an option as to the time, place, or manner of delivery he must give the other party reasonable notice of his choice, and if he does not give such notice within a reasonable time, his right of option is waived: Cal Civ. Code, § 1756. See Stims. Am. Stat. Law. p. 544, § 4566.

9 See 2 Schouler on Personal Property, § 384; citing, *Bennett's Benjamin on Sales*, § 677; *Armitage v. Insole*, 14 Q. B. 728; *Stanton v. Austin*, Law R. 7 Com. P. 651; *Posey v. Scales*, 55 Ind. 282. Notice to deliver discussed: 2 Corbin's *Benjamin on Sales*, § 1018, n. 7.

§ 229. *Place of delivery.*—*Place of sale.* If no place of delivery<sup>1</sup> be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of sale.<sup>2</sup> And the store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand, and is silent as to the place.<sup>3</sup> Nor is it incumbent upon the seller, or prudent in him, to take the goods from place to place in search of the buyer, and thus expose the goods to hazard and increased expense.<sup>4</sup>

*Other place.* But some other place than the place of sale may be required as the place of delivery by the nature of the articles, or by the usage of trade, or by the previous course of dealing between the parties, or may be inferred from the general circumstances of the case.<sup>5</sup>

*Fixed by agreement.* Wherever a place of delivery is agreed upon, the buyer is not bound to accept the goods, nor the seller to tender them elsewhere;<sup>6</sup> but when delivery is made at a specified place, as by rail to a certain point, where the buyer is to come for the

goods, the seller's duty is performed, and presumably the title and its risks are transferred.<sup>1</sup>

1 Place of delivery : *Janney v. Sleeper*, 30 Minn. 473.

2 2 Kent Com. 505. Place of sale as place of delivery : *Lewis v. Thomas*, 14 Mo. App. 581. It is enacted in California that personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced : Cal. Civ. Code, § 1754. See *Stims. Am. Stat. Law*, p. 544, § 4366.

3 2 Kent Com. 505, and cases cited ; 2 Schouler on Personal Property, § 385; citing, also, *Pothier Traite des Oblig.* No. 512; *Rice v. Churchill*, 2 Denio, 145; *Smith v. Gillett*, 50 Ill. 290; *Middlesex Co. v. Osgood*, 4 Gray, 429; *Miles v. Roberts*, 34 N. H. 253. Consult, further, 2 Corbin's Benjamin on Sales, § 1022, p. 890, n. 10; *Bennett's Benjamin on Sales*, 682; citing, 2 Chitty on Contracts (11th Am. ed.), 120, et seq. and notes; *Barr v. Myers*, 3 Watts & S. 299; *Lobdell v. Hopkins*, 5 Cowen, 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Kraft v. Hurtz*, 11 Mo. 109.

4 2 Schouler on Personal Property, § 385.

5 Story on Sales, § 308.

6 See Story on Sales, § 308. Designation of place of delivery : See succeeding section on that subject. Waiver of condition determining place of delivery : *McCombs v. McKennan*, 2 Watts & S. 216. Parol variation of stipulated place of delivery : *Hunt v. Thurman*, 15 Vt. 336; 40 Am. Dec. 683, 685.

7 See *Sedgwick v. Cottenham*, 54 Iowa, 512; also, *Washburn Co. v. Russell*, 130 Mass. 543. And if the goods at the time of sale be in the buyer's own possession, and under his control, there is presumed to be no other place of delivery agreed upon, nor, indeed, any formal act of delivery expected at all : 2 Schouler on Personal Property, § 385; citing, *Shurtleff v. Willard*, 19 Pick. 210; *Warden v. Marshall*, 99 Mass. 305; *Lake v. Morris*, 30 Conn. 201. License to go on premises, etc. : See 2 Corbin's Benjamin on Sales, § 1020, n. 9; *Bennett's Benjamin on Sales*, §§ 679-681; citing, *McLeod v. Jones*, 105 Mass. 403, and cases cited; *McNeal v. Emerson*, 15 Gray, 384; *Wood v. Manley*, 11 Ad. & E. 34; *Bentall v. Bur*, 3 Barn. & C. 423; *Langdell's Cases on Sales*, 132; *Wood v. Tassell*, 6 Q. B. 234; *Salter v. Woollams*, 2 Man. & G. 650.

§ 230. Designation of place of delivery.—*Buyer's address.* Sometimes the seller holds himself ready by the express terms of the contract to send the chattels to the buyer's address;<sup>1</sup> and if this address be designated, the seller must be ready to make appropriate delivery.<sup>2</sup>

*Seller's readiness.* And in general, where the vendee is by the terms of the contract to designate a place of delivery, the vendor is bound to be ready to make delivery at the place designated;<sup>3</sup> but if the vendee omit

to designate the place, the vendor is guilty of no breach of contract, if the articles are ready for delivery at the time fixed by the contract.<sup>4</sup>

1 Devine v. Edwards, 101 Ill. 138.

2 2 Schouler on Personal Property, § 385.

3 Lucas v. Nichols, 5 Gray, 309, 311. Delivery at place designated by vendee's agent: Mellidge v. Boston Iron Co. 5 Cush. 158; 51 Am. Dec. 59, 72.

4 Lucas v. Nichols, 5 Gray, 309, 311; Bennett's Benjamin on Sales, 682, n. a, p. 794; citing, also, Smith v. Wheeler, 7 Or. 49; Bolton v. Riddle, 35 Mich. 13; Boyd v. Gunnison, 14 W. Va. 1; Brunskill v. Muir, 15 Up. Can. Q. B. 213. If the buyer was to name the place of delivery and fails to do so, the seller's offer of readiness to perform suffices for his own duty: Hunter v. Wetsell, 84 N. Y. 549; 38 Am. Rep. 544; as noted, 2 Schouler on Personal Property, § 385, p. 387.

§ 231. *Time of delivery.* — *Failure to comply with agreement concerning.* If any time of delivery be agreed upon, and the vendor fail to comply with the agreement, the vendee will not be bound to accept, if a compliance with the terms in respect of time be an essential consideration of the bargain.<sup>1</sup> And if the vendee suffer injury by the neglect, or refusal, or inability of the vendor to deliver the goods at the agreed time,<sup>2</sup> such vendee will be entitled to damages therefor.<sup>3</sup>

*Demand under option sale.* Under a contract of sale of personal property to be delivered at the option of the buyer on or before a certain date, the buyer has the right to demand the immediate delivery thereof at any time up to that date, but if no demand is made until after the time stipulated, the seller is entitled to a reasonable time after demand in which to deliver.<sup>4</sup>

*Obligation to deliver at specified time.* One who sells goods to be delivered at a certain time,<sup>5</sup> as bales of rags by prompt steamer or sail shipment, is presumed to have them on hand, or to have arranged to carry out his contract;<sup>6</sup> and he cannot excuse himself by saying that he expected to buy the goods, but could not.<sup>7</sup> In order to establish a waiver of an obliga-

tion to deliver at a time specified, there must be shown either such acts of the purchaser, before the expiration of the time, as amount to an estoppel,<sup>8</sup> or after the expiration of the time, an agreement founded on a new consideration.<sup>9</sup>

*"Forthwith," etc.* Whether a written contract of sale expresses the time of delivery or not, its language may yet call for judicial interpretation.<sup>10</sup> Thus, "a reasonable time" necessarily involves longer delay than such expressions as "directly,"<sup>11</sup> "forthwith,"<sup>12</sup> or "immediately,"<sup>13</sup> especially if the seller might have performed according to his promise, or else used means in his power to get his contract modified.<sup>14</sup>

*"As soon as possible."* A contract to deliver goods "as soon as possible," according to its natural import, is held to refer not to a logical possibility, but to the power of the seller to fulfill the stipulation consistently with the proper execution of his prior orders;<sup>15</sup> though the latest cases impose a meaning more analogous to "within a reasonable time."<sup>16</sup>

1 Story on Sales, § 310; citing, *Hipwill v. Knight*, 1 Younge & C. 415; *Coslake v. Till*, 1 Russ. 376; *Winshurst v. Deeley*, 2 Com. B. 253; 2 Story's Eq. Juris. § 776, and cases cited; *Pothier Contrat de Vente*, No. 49 a.

2 Such conduct not made out under construction given to contract: *Rhodes v. Cleveland Rolling Mill Co.* 17 Fed. Rep. 426.

3 See Story on Sales, § 310.

4 *Holt v. Brown*, 63 Iowa, 319, 323; citing, 2 Parsons on Contracts, 250.

5 No certain or definite time fixed: *Rhodes v. Cleveland Rolling Mill Co.* 17 Fed. Rep. 426.

6 See *New Haven etc. R. R. v. Quintard*, 31 N. Y. Sup. Ct. 89.

7 *Phillips v. Taylor*, 49 N. Y. Sup. Ct. 318, 321.

8 See citations in next note.

9 *Phillips v. Taylor*, 49 N. Y. Sup. Ct. 318; citing, *Hill v. Blake*, 48 N. Y. Sup. Ct. 253. And referring, also, to *Brown v. Bowen*, 20 N. Y. 541, and *Underwood v. Farmers' etc. Ins. Co.* 57 N. Y. 306. Compare *Davis v. Budd*, 60 Iowa, 144; *Hill v. Blake*, 97 N. Y. 216.

10 2 Schouler on Personal Property, § 386.

11 See *Duncan v. Topham*, 8 Com. B. 225.

12 See *Stanton v. Wood*, 16 Q. B. 633; *Roberts v. Brett*, 11 H. L. Cas. 337; 34 Law J. Com. P. 241; *Campbell on Sales*, 279.

13 See citations in next note. "As soon as possible," construed: *Rhodes v. Cleveland Rolling Mill Co.* 17 Fed. Rep. 426, 431. And see next subdivision of section.

14 See *Duncan v. Topham*, 8 Com. B. 225; *Rommell v. Wingate*, 103 Mass. 327; *Roberts v. Brett*, 11 H. L. Cas. 337; *Isaacs v. Plaster Works*, 67 N. Y. 124; so cited, 2 *Schouler on Personal Property*, § 386. And consult *Bennett's Benjamin on Sales*, § 687. But compare *Stainton v. Wood*, 16 Q. B. 638 ("forthwith"). And see *Neldon v. Smith*, 36 N. J. L. 148 ("immediate delivery").

15 *Atwood v. Emery*, 1 Com. B. N. S. 110. And see *Campbell on Sales*, 279.

16 *Hydraulic Engineering Co. v. McHaffie*, Law R. 4 Q. B. D. 670; 20 Eng. Rep. 102; *Pope v. Filley*, 3 McCrary, 190; 2 *Schouler on Personal Property*, § 386. And consult *Bennett's Benjamin on Sales*, § 687; *Rhodes v. Cleveland Rolling Mill Co.* 17 Fed. Rep. 426.

§ 232. Reasonable time.—*When no time set for delivery.* In the absence of evidence to the contrary, the law supposes a reasonable time for delivery, which is the exact standard of diligence whether the seller or buyer is to take the initiative, unless a definite time is set, when it is of the essence of the contract between the parties.<sup>1</sup>

*Determination of.* What is a "reasonable time" will depend upon the circumstances,<sup>2</sup> and is determined by deducing the real meaning of the parties from their uncertain expressions.<sup>3</sup>

*Parol evidence concerning.* When a written contract of sale says nothing as to time, it may be shown by parol evidence<sup>4</sup> of the facts and circumstances attending the transaction,<sup>5</sup> what the parties thought was a reasonable time for delivery.<sup>6</sup>

*Circumstances of contract.* The question of a reasonable time is determined by a view of all the circumstances of the case, by placing the court and jury in the same situation as the contracting parties were at the time they made the contract; that is, by placing before them all the circumstances known to both parties at the time.<sup>7</sup> And for that purpose it has been held

that evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what they thought was a reasonable time.<sup>8</sup>

1 2 Schouler on Personal Property, § 336; citing, *Higgins v. Delaware* etc. R. R. 60 N. Y. 553; *Bolton v. Riddle*, 35 Mich. 13; *Kellam v. McKinstry*, 69 N. Y. 264. And consult 2 Corbin's Benjamin on Sales, § 1023, n. 11.

2 Reasonable time in general: 2 Bouvier Law Dict. (14th ed.) 415; Winfield's Words etc. 519; quoting, *Goodwin v. Creveley*, 4 Hurl. & N. 633; *Jackson v. Saunders*, 1 Schoales & L. 461; *Graham v. Van Dieman's Land Co.* 30 Eng. L. & Eq. 573.

3 See 2 Schouler on Personal Property, § 336.

4 Admissibility of parol evidence in general: 1 Greenleaf on Evidence (11th. ed.), §§ 275-305.

5 See Bennett's Benjamin on Sales, § 633; stating, *Ellis v. Thompson*, 3 Mees. & W. 445.

6 2 Schouler on Personal Property, § 336. But it cannot be thus shown that any specific time was agreed upon, for this would be to supersede the written instrument; nor does reasonable time necessarily mean the time usually taken by other parties to perform a similar act: 2 Schouler on Personal Property, § 336; citing, *Ford v. Cotesworth*, Law R. 7 Q. B. 127; *Cocker v. Franklin* etc. Co. 3 Sum. 530; *Atwood v. Cobb*, 16 Pick. 227.

7 *Roberts v. Mazeppa Mill Co.* 30 Minn. 413, 415, 416; citing, *Ellis v. Thompson*, 3 Mees. & W. 445; *Cocker v. Franklin H. & F. Manuf. Co.* 3 Sum. 530.

8 See *Cocker v. Franklin H. & F. Manuf. Co.* 3 Mees. & W. 445; *Coates v. Sangston*, 5 Md. 121; as cited in support of proposition in *Roberts v. Mazeppa Mill Co.* 30 Minn. 413, 416, holding question of reasonable time as one for jury, under rule laid down in *Cochran v. Toher*, 14 Minn. 293 (385); *Derosta v. Winona & St. Peter R. Co.* 13 Minn. 119 (133); *Pinney v. First Div. etc. R. Co.* 19 Minn. 211 (251).

§ 233. Divisions of time.—“*Month.*” The word “month”<sup>1</sup> generally means a lunar month;<sup>2</sup> but in mercantile contracts it commonly means a calendar month;<sup>3</sup> and in England, such is the interpretation both by commercial usage<sup>4</sup> and by statute.<sup>5</sup>

“*Days.*” Where a certain number of “days” is to be allowed for the delivery,<sup>6</sup> they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed,<sup>7</sup> or an usage to that effect be shown.<sup>8</sup>

*Hour of last day.* In regard to the hour of the last day which the law sets as the final limit for punctual delivery,<sup>9</sup> a tender in the evening, giving time for

examination, etc., before midnight has been sustained as not unreasonably late;<sup>10</sup> but when daylight is required for the proper examination and assortment of the thing tendered, it is said that there can be but little doubt that time should be given for such examination before sunset and by daylight.<sup>11</sup>

1 Judicial interpretations of word collected: 2 Abbott's Law Dict. 123, 124.

2 See 2 Bouvier Law Dict. (14th ed.) 195; Winfield's Words etc. 403; quoting, *Rives v. Guthrie*, 1 Jones (N. C.) 87.

3 1 Bouvier's Law Dict. (14th ed.) 195. And see 2 Schouler on Personal Property, § 386; citing, *Churchill v. Merchants' Bank*, 19 Pick. 532.

4 See *Reg. v. Chawton*, 1 Q. B. 247, 250; *Webb v. Fairmaner*, 3 Mees. & W. 473.

5 Stats. 13 Vict. ch. 21, § 4. See Campbell on Sales, 279. Consult further, 2 Abbott's Law Dict. 123.

6 Day in general: Winfield's Words etc. 172; quoting, *Helplenstrue v. Vincennes Nat. Bank*, 65 Ind. 589; *Haines v. State*, 7 Tex. App. 33; *People v. Hatch*, 33 Ill. 137; *Pulling v. People*, 8 Barb. 385.

7 *Brown v. Johnson*, 10 Mees. & W. 331.

8 *Cochran v. Retberg*, 3 Esp. 121; Bennett's Benjamin on Sales § 684.

9 It is enacted in California that the delivery of a thing sold can be offered or demanded only within reasonable hours of the day: Cal. Civ. Code, § 1753.

10 *Startup v. McDonald*, 6 Man. & G. 593. See Campbell on Sales, 278; Bennett's Benjamin on Sales, §§ 685, 686; Story on Sales, § 310.

11 *Croninger v. Crocker*, 61 N. Y. 151, 153. And see 2 Schouler on Personal Property, § 387; referring to *McClartey v. Gokey*, 31 Iowa, 505; 2 Corbin's Benjamin on Sales, § 1026, n. 16; referring to *Kirkpatrick v. Alexander*, 60 Ind. 95; *Bass v. White*, 65 N. Y. 565; and reconciling *Berry v. Noll*, 54 Ala. 446, 454.

§ 234. *Computation of time.—Days excluded.* As to the computation of time in general,<sup>1</sup> the modern rule, which has a general legal application, excludes the day from which computation begins, as well as any day expressly set as a final limit under such expressions as "until," "up to," or "between."<sup>2</sup> Thus an undertaking to deliver "in three months from April 2d," would give the seller July 2d as his last day of delivery;<sup>3</sup> but his promise to deliver "between April 2d and July 2d,"<sup>4</sup> or at any time "until July 2d,"<sup>5</sup> will oblige him to deliver by July 1st.<sup>6</sup>

"To." It is not positively settled whether "to" shall be taken as a word of like exclusive force;<sup>7</sup> but the better opinion is that it has sometimes the inclusive and sometimes the exclusive sense, and inclines to give the benefit of the doubt to the party charged in the transaction with the duty of performance.<sup>8</sup>

"On," etc. A promise to deliver "on or before" such a day is held in some of the United States to give the seller the whole of that day to make delivery;<sup>9</sup> but whether "on" shall be taken as a word of exclusive or inclusive force is still a matter of controversy in England.<sup>10</sup>

1 See 2 Bouvier Law Dict. (14th ed.) 595. And consult 1 Abbott's Law Dict. 339, very fully discussing subject.

2 2 Schouler on Personal Property, § 386.

3 See Webb v. Fairmaner, 3 Mees. & W. 473; Campbell on Sales, 278.

4 Compare Cleveland v. Sterrett, 70 Pa. St. 204; approved in Coniwingo Petroleum Co. v. Cunningham, 75 Pa. St. 138.

5 See People v. Walker, 17 N. Y. 502. But compare Houghwort v. Boisaubin, 18 N. J. Eq. 315.

6 2 Schouler on Personal Property, § 386; citing, Farwell v. Rogers, 4 Cush. 460; Atkins v. Boylston etc. Ins. Co. 5 Met. 440; People v. Walker, 17 N. Y. 502; Newby v. Rogers, 40 Ind. 9; Pease v. Norton, 6 Greenl. 229. And consult Bennett's Benjamin on Sales, § 684, n. l; 2 Corbin's Benjamin on Sales, § 1024, n. 15.

7 See citations in next note. "To" in general: 2 Abbott's Law Dict. 569.

8 See Coniwingo Co. v. Cunningham, 75 Pa. St. 138, quoted in support of text in 2 Schouler on Personal Property, § 386.

9 Adams v. Dale, 29 Ind. 273. "On or before," in general: 2 Abbott's Law Dict. 209.

10 See Coddington v. Paleologo, Law R. 2 Ex. 193; 2 Schouler on Personal Property, § 386.

§ 235. Quantity delivered.—*Excessive quantity.* How much shall be delivered depends upon the terms of the contract, the rule being that the seller must deliver just what he has bargained to deliver,<sup>1</sup> no more and no less.<sup>2</sup> He has no right to mix the goods ordered with others not ordered, and so put the buyer to the alternative of taking the whole, and selecting his portion;<sup>3</sup> nor in general to deliver a quantity in excess<sup>4</sup> of that ordered.<sup>5</sup>



*Less than stipulated quantity.* The delivery of a less quantity than that bargained for<sup>6</sup> is still a greater breach of duty by the seller, since no such simple act as separation could put the parties where they agreed to stand.<sup>7</sup> And where less than the quantity sold is delivered, the buyer may refuse to accept,<sup>8</sup> on the ground of the seller's non-performance of a condition precedent;<sup>9</sup> though if he really accepts part as a substantial performance of the contract, he renders himself accountable for its value.<sup>10</sup>

1 See succeeding citations in section.

2 2 Schouler on Personal Property, § 388. And see Campbell on Sales, 280; citing, *Hart v. Mills*, 15 Mees. & W. 85; *Cunliffe v. Harrison*, 6 Ex. 903; *Langdell's Cases on Sales*, 844; *Waddington v. Oliver*, 2 Bos. & P. N. R. 61.

3 See *Levy v. Green*, 8 El. & B. 575 (crocery-ware packed in crate with that of a different pattern). Compare *Nicholson v. Bradfield Union*, Law R. 1 Q. B. 620; *Iron Cliffs Co. v. Buhl*, 24 Mich. 86.

4 See *Cunliffe v. Harrison*, 6 Ex. 903 (fifteen instead of ten hogsheads of wine).

5 See *Dixon v. Fletcher*, 3 Mees. & W. 146; *Hart v. Mills*, 15 Mees. & W. 85; *Cunliffe v. Harrison*, 9 Ex. 903; *Langdell's Cases on Sales*, 844; *Nicholson v. Bradfield Union*, Law R. 1 Q. B. 620; *Reuter v. Sala*, Law R. 4 C. P. D. 239; *Rommell v. Wingate*, 103 Mass. 327; *Croninger v. Crocker*, 62 N. Y. 151; *Chandler v. De Graff*, 27 Minn. 208; so cited, 2 Schouler on Personal Property, § 388. And consult Bennett's Benjamin on Sales, § 639; 2 Corbin's Benjamin on Sales, § 1030, n. 17, stating and illustrating distinction said to be made in American cases.

6 See succeeding portions of section.

7 2 Schouler on Personal Property, § 388.

8 See citations in next note.

9 See *Morgan v. Gath*, 3 Hurl. & C. 748; *Waddington v. Oliver*, 2 Bos. & P. N. R. 61; *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Rockford etc. R. R. Co. v. Lent*, 63 Ill. 288; *Wright v. Barnes*, 14 Conn. 518; *Smith v. Lewis*, 40 Ind. 98; *Marland v. Stanwood*, 101 Mass. 470.

10 See *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Haines v. Tucker*, 50 N. H. 307; 2 Schouler on Personal Property, § 388, whence paragraph derived. And consult Bennett's Benjamin on Sales, § 690; 2 Corbin's Benjamin on Sales, § 1032, notes 18, 19.

§ 236. **Contract for indefinite quantity.**—*Construction favorable to seller.* Where the contract itself permits of some latitude of construction as to the quantity which the seller is to furnish,<sup>1</sup> the courts, under the doctrine favoring substantial compliance with the contract rather

than literal fulfillment, will avail themselves of the opportunity to give the seller a fair margin, so far as this may be done without detriment to the buyer.<sup>2</sup>

*Words of estimate and expectation.* And such expressions as "more or less,"<sup>3</sup> "about,"<sup>4</sup> and the cautious words "say about,"<sup>5</sup> are words of estimate and expectation only,<sup>6</sup> which mark the seller's purpose not to bind himself to any precise quantity, but merely to keep reasonably close to the amount named.<sup>7</sup> But the full import of such expressions is often a matter of great doubt, where no criterion of quantity can be gathered from other parts of the contract to which the estimate relates.<sup>8</sup>

1 See succeeding portions of section.

2 2 Schouler on Personal Property, § 389.

3 See *Cross v. Eglin*, 2 Barn. & Adol. 106; *Cockerell v. Aucompte*, 2 Com. B. N. S. 440; 26 Law J. Com. P. 194; *Creighton v. Comstock*, 27 Ohio St. 548; *Holland v. Rea*, 48 Mich. 218; *Day v. Cross*, 59 Tex. 595, 604, 605.

4 See *Bourne v. Seymour*, 16 Com. B. 337; *Moore v. Campbell*, 10 Ex. 323; 23 Law J. Ex. 310; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *McLay v. Perry*, 44 L. T. N. S. 152; *Clapp v. Thayer*, 112 Mass. 296.

5 See *McConnell v. Murphy*, Law R. 5 P. C. 203; 8 Eng. Rep. 164; *Morris v. Levison*, Law R. 1 C. P. D. 155.

6 Rules of construction concerning such expressions: *Brawley v. United States*, 6 Otto, 168, 171; quoted, *Day v. Cross*, 59 Tex. 595, p. 604.

7 2 Schouler on Personal Property, § 389; citing, *McConnell v. Murphy*, Law R. 5 P. C. 203; 8 Eng. Rep. 164 ("say about six hundred spars"); *Cross v. Eglin*, 2 Barn. & Adol. 106; *Moore v. Campbell*, 10 Ex. 323; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *Shepard v. Lynch*, 26 Kan. 377; and referring as to bills of lading, to *Tamvaco v. Lucas*, 1 El. & E. 581, 592; and as to "average weight," to *Cash v. Hinkle*, 36 Iowa, 623. Consult further, *Bennett's Benjamin on Sales*, §§ 691, 692; 2 *Corbin's Benjamin on Sales*, § 1039 n. 22; *Day v. Cross*, 59 Tex. 595, 604, 605; *Holland v. Rea*, 48 Mich. 218, 221.

8 See *Bourne v. Seymour*, 16 Com. B. 337; *Robinson v. Noble*, 8 Peters, 181; so cited, 2 Schouler on Personal Property, § 389. And consult *Brawley v. United States*, 6 Otto, 168, 171. Construction of order for "a small cargo" of wood, "in all about sixty cubic fathoms": *Kreuger v. Blanck*, Law R. 5 Ex. 179.

§ 237. *Partial delivery.*—*Under entire contract.* If only a portion under an entire contract is seasonably delivered, the buyer may refuse to receive the residue;<sup>1</sup>

but until the period of delivery has elapsed the seller has the opportunity of remedying errors and making up a deficiency;<sup>2</sup> and in the mean while the buyer is not put to his election between returning the portion delivered on the ground of non-performance, and keeping it to be paid for.<sup>3</sup> Where the plaintiff contracted to sell and deliver six hundred and ninety-nine boxes of glass to defendant, delivery to be made at one time, but prior to any delivery the defendant wrote to plaintiff asking for immediate delivery of a small portion, whereupon plaintiff delivered three hundred and sixty-five boxes, which the defendant received and used, afterwards writing that he wished the order completed in a reasonable time, and a correspondence ensuing as to the terms of the agreement, the plaintiff subsequently offered to complete, but defendant declined on the ground that the time had elapsed, it was held that the plaintiff could recover for the amount delivered.<sup>4</sup>

*Parcels deliverable from time to time.* So if the contract was for a certain quantity to be delivered in parcels from time to time, the parcels first delivered may be returned if the seller fails to deliver the latter parcels as promised;<sup>5</sup> for when the period of delivery has elapsed it may be asked whether the total amount contracted for is already delivered.<sup>6</sup>

1 See *Wilson v. Wagar*, 26 Mich. 452. Retaining part delivered: See *Reed v. Randall*, 29 N. Y. 355; 86 Am. Dec. 305, 311.

2 2 Schouler on Personal Property, § 388, whence paragraph derived.

3 Compare *Waddington v. Oliver*, 2 Bos. & P. N. R. 61; *Oxendale v. Wetherell*, 9 Barn. & C. 386.

4 *Avery v. Wilson*, 81 N. Y. 341; 37 Am. Rep. 503.

5 See citations in next note.

6 2 Schouler on Personal Property, § 388; relying upon *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Haines v. Tucker*, 50 N. H. 307. And see *Catlin v. Tobias*, 26 N. Y. 217; 84 Am. Dec. 183. Acceptance of part delivery under entire and severable contracts, with consideration of modern American rule: 2 Corbin's *Benjamin on Sales*, § 1032, n. 19. And consult *Avery v. Wilson*, 81 N. Y. 341; 37 Am. Rep. 503.

§ 238. *Delivery by instalments.*—*Modification of contract.* A contract which provides for delivery by instalments<sup>1</sup> may become inextricably complicated under the postponement from time to time of full periodical performance with the buyer's assent, and the substitution of new terms by mutual assent;<sup>2</sup> but whatever the modifications of a contract not rescinded, the seller still remains bound to make delivery at some reasonable time, and hence cannot rightfully refuse performance altogether.<sup>3</sup>

*Need of payment.* It has been held that the purchaser of goods to be delivered in instalments, and to be paid for as delivered, cannot claim further deliveries without paying for the part which has been delivered, and therefore he cannot require the tender of any more of them by the vendor without doing so.<sup>4</sup>

*Entire or severable contract.* But a partial delivery of goods under an entire contract, even though delivery of the residue has been rendered impossible under circumstances which exempt the seller from full performance, will not, apart from a waiver on the buyer's part, enable him to enforce part performance against the buyer;<sup>5</sup> though it is a matter of construction whether a given contract shall be deemed an entire one with partial deliveries, or as providing for a separate sale of each lot.<sup>6</sup>

1 See generally *Mersey Steel etc. Co. v. Naylor*, Law R. 9 App. Cas. 434; 36 Eng. Rep. 164; *Honck v. Muller*, Law R. 7 Q. B. D. 92; 36 Eng. Rep. 264; *Norrington v. Wright*, 115 U. S. 188; 6 Sup. Ct. Rep. 12; *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159; *Gill v. Benjamin*, 64 Wis. 362; 54 Am. Rep. 619; *Johnson v. Allen*, 78 Ala. 387; 56 Am. Rep. 34.

2 2 Schouler on Personal Property, § 390. And see *Davis v. Budd*, 60 Iowa, 144; *Hill v. Blake*, 97 N. Y. 216.

3 *Tyers v. Rosedale etc. Iron Co.* Law R. 10 Ex. 195, reversing S. C. Law R. 8 Ex. 305; as cited, 2 Schouler on Personal Property, § 390; referring, also, to *Ireland v. Livingston*, Law R. 5 H. L. 395; *Neldon v. Smith*, 36 N. J. L. 148; *O'Neill v. James*, 43 N. Y. 84; *Bergheim v. Iron Co.* Law R. 10 Q. B. 319. Contract silent as to quantity to be delivered of each of various kinds enumerated, or at each of certain fixed periods: *Metz v. Albrecht*, 52 Ill. 491.

4 *Walton v. Black*, 4 Houst. 149. Instalment deliveries considered: *Bennett's Benjamin on Sales*, §§ 593, 593 a; 2 *Corbin's Benjamin on Sales*, § 909, n. 26; *Campbell on Sales*, 281-295. And see authorities cited in note at beginning of section.

5 See *Klein v. Tupper*, 52 N. Y. 550.

6 See *Verkamp v. Hurlburt Co.* 58 Cal. 229; 41 Am. Rep. 265; *Gardner v. Clark*, 21 N. Y. 399; *Couston v. Chapman*, Law R. 2 H. L. S. App. 250; 3 Eng. Rep. 187; 2 *Schouler on Personal Property*, § 390, whence paragraph derived. Compare § 237, on PARTIAL DELIVERY.

§ 239. *Mode of making.*—*Unspecified and specified chattels.* The mode of making delivery involves in the case of unspecified chattels the idea of such acts as separation, selection, and setting apart for the buyer;<sup>1</sup> while in the case of specific chattels, the extent of the seller's duty depends upon such circumstances as the character and situation of the property,<sup>2</sup> and the nature of the agreement between the parties, whereby the seller is either to merely let the buyer take the goods,<sup>3</sup> or is to forward them to the latter.<sup>4</sup>

*Tender of thing sold.* A mere offer to deliver does not constitute a sufficient compliance with the seller's engagement to deliver, but there must be either actual or constructive delivery,<sup>5</sup> and at least an actual tender<sup>6</sup> of the thing.<sup>7</sup>

*Ponderous articles.* Where goods, however, are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or the delivery of other *indicia* of property.<sup>8</sup>

*Symbolical or constructive delivery.* And this doctrine of symbolical or constructive delivery<sup>9</sup> applies not only where the goods are ponderous or bulky, or cannot conveniently be delivered manually, but also where they are not in the personal custody of the seller, and are put into the absolute power and subject to the authority of the buyer.<sup>10</sup>

*Goods in buyer's possession.* If the thing sold be already in the buyer's possession and control, the property will pass without any formal act of delivery,<sup>11</sup> if the circumstances and subsequent conduct of the parties are consistent with such mutual intention.<sup>12</sup>

1 See § 103, on SELECTION AND SEPARATION. And consult note to *Walden v. Murdock*, 83 Am. Dec. 142.

2 See *Hayden v. Demets*, 53 N. Y. 426. Delivery of cattle running at large: See *Walden v. Murdock*, 23 Cal. 540; 83 Am. Dec. 135, n. 142; *Bennett's Benjamin on Sales*, § 696, n. b; 2 Kent Com. 500; *Hall v. Richardson*, 16 Md. 397; 77 Am. Dec. 303, 307.

3 See § 228, on DUTY TO DELIVER.

4 See 2 Kent Com. 499, 500; 1 Schouler on Personal Property, §§ 87, 88; 2 Schouler on Personal Property, § 391 (basis of paragraph). The law requires good faith, and such acts only as are practicable according to the character of the thing tendered and the nature of the business: *Hayden v. Demets*, 53 N. Y. 426. Delivery subject to inspection: *McLennan v. McDermid*, 50 Mich. 379. Delivery "ex vessel": *Cunningham v. Judson*, 100 N. Y. 179; 2 N. E. Rep. 915. Delivery at one time and in one lot not required: *Roberts v. Mazzeppa Mill Co.* 30 Minn. 413, 415.

5 See on these kinds of delivery, *Bolin v. Huffnagle*, 1 Rawle, 9, 19; *Brown v. Volkening*, 64 N. Y. 80; *Winfield's Words* etc. 17, 139; 1 *Abbott's Law Dict.* 360; § 222, on ACTUAL AND CONSTRUCTIVE DELIVERY.

6 Tender in general: 2 *Bouvier Law Dict.* (14th ed.) 581. Sufficiency of tender of goods sold: *Hayden v. Demets*, 53 N. Y. 426; *Van Sickle v. Nester*, 34 Hun, 64.

7 See *Webber v. Minor*, 6 Bush, 463; as cited, 2 Schouler on Personal Property, § 391. Further tender dispensed with: *Van Sickle v. Nester*, 34 Hun, 64. Tender by wagon-loads and from day to day sustained: *Van Sickle v. Nester*, 34 Hun, 64. Tender of manufactured article: See *Smith v. Wheeler*, 7 Or. 49; 33 Am. Rep. 698.

8 *Chaplin v. Rogers*, 1 East, 696; *Langdell's Cases on Sales*, 97. And see *Ellis v. Hunt*, 3 Term Rep. 464; *Ross' Leading Cases*, 153; *Bennett's Benjamin on Sales*, § 696; *Story on Sales*, § 311; 1 Schouler on Personal Property, §§ 87, 88; 2 Schouler on Personal Property, § 391; citing, also, 2 Kent Com. 499, 500, and *Thompson v. Baltimore* etc. R. 23 Md. 396. Consult *Hall v. Richardson*, 16 Md. 397; 77 Am. Dec. 303, 307; *Van Brunt v. Pike*, 4 Gill, 270; 45 Am. Dec. 126, 128.

9 See 1 *Bouvier Law Dict.* tit. Delivery (14th ed.) 452.

10 See *Story on Sales*, § 311; 2 Schouler on Personal Property, § 391. Delivery of the brass knobs worn by oxen not presumably a symbolical delivery of the oxen themselves: *Clark v. Draper*, 19 N. H. 419.

11 See *Story on Sales*, § 312 a; *Griffin v. Wright*, 1 Tex. App. (Civ. Cas.) § 638.

12 See *Warden v. Marshall*, 99 Mass. 305; *Lake v. Morris*, 30 Conn. 201; *Stowe v. Taft*, 58 N. H. 444, as cited in support of text in 2 Schouler on Personal Property, § 399. And consult *Griffin v. Wright*, 1 Tex. App. (Civ. Cas.) § 638.

§ 240. *Symbolical delivery.*—*In general.* Symbolic delivery is the delivery of some thing as a representation or sign of the delivery of some other.<sup>1</sup> And where an actual delivery of goods cannot be made,<sup>2</sup> a symbolical delivery of some particular thing,<sup>3</sup> as a half-penny, will vest the property equally with an actual delivery.<sup>4</sup>

*Bills of sale and of lading.* Transfers of a ship at sea by bill of sale,<sup>5</sup> and of a cargo or of goods in transit, or in a warehouse by delivery of the bill of lading,<sup>6</sup> are familiar instances of symbolic delivery.<sup>7</sup>

*Cumbrous property.* And a symbolic delivery operating by force of the making of a present contract without any further formality, is held sufficient<sup>8</sup> to pass possession as well as property,<sup>9</sup> in the case of the sale of logs floating in the water, or other cumbrous property.<sup>10</sup>

1 2 Bouvier Law Dict. (14th ed.) 575. And see 2 Abbott's Law Dict. 533; citing, 2 Blackst. Com. 313-315; 1 Steph. Com. 507, 508.

2 Actual delivery defined: *Bolin v. Huffnagle*, 1 Rawle, 9, 19; 1 Abbott's Law Dict. 360. And see Winfield's Words etc. 17; quoting, *Brown v. Volkening*, 64 N. Y. 80.

3 See 2 Kent Com. 500.

4 2 Bouvier Law Dict. (14th ed.) 575; citing, Long on Sales, 575. Delivering key of granary: *Sharp v. Carroll*, 27 N. W. Rep. (Mich.) 832. Nailing up crib, etc.: *Pope v. Cheney*, 27 N. W. Rep. (Iowa) 754.

5 Bill of sale: See 1 Bouvier Law Dict. (14th ed.) 207; 1 Abbott's Law Dict. 149.

6 Bill of lading: See under chapter on DOCUMENTS OF TITLE. And consult Winfield's Words etc. 77, 78; 1 Abbott's Law Dict. 148.

7 2 Corbin's Benjamin on Sales, § 1044, n. 26; referring to *Conrad v. Atlantic Ins. Co.* 1 Peters, 445; *Gibson v. Stevens*, 8 How. 384, 389; *Prickett v. Read*, 31 Ark. 131; *King v. Jarman*, 35 Ark. 190, 196; *Davis v. Russell*, 52 Cal. 611; 23 Am. Rep. 647; *Russell v. O'Brien*, 127 Mass. 349. And see 1 Abbott's Law Dict. 360; Story on Sales, § 311.

8 See 2 Kent Com. 500.

9 See citations in next note.

10 See *Leonard v. Davis*, 1 Black, 476, 482; *Hayden v. Demets*, 53 N. Y. 426; *Ruffer v. United States*, 15 Ct. of Cl. 291; 2 Corbin's Benjamin on Sales, § 1044, n. 26, citing these cases in support of text, and also *Tognini v. Kyle*, 17 Nev. 209; 45 Am. Rep. 442, and cases cited.

§ 241. *Constructive delivery.*—*In general.* The terms "constructive delivery" and "symbolical delivery"

are sometimes used as synonyms.<sup>1</sup> But, strictly speaking, constructive delivery includes symbolical delivery, and also all those acts which by construction of law are deemed sufficient to transfer the possession.<sup>2</sup>

*Bailee for buyer.* And a delivery may take place by mere arrangement that the seller or a third person having the possession shall hold as bailee for the buyer.<sup>3</sup>

*Order on borrower.* But it has been held that where the owner of a threshing machine, which was in the possession of a third person, to whom it had been loaned, gave the purchaser, who executed his note for the price, an order on said person for the machine, this did not constitute a delivery of the article.<sup>4</sup>

*Of part for whole.* There may be a constructive delivery of part for the whole, where the goods are scattered about in various places, and the simultaneous delivery of each part is impracticable.<sup>5</sup>

*Giving opportunity to take possession.* And in general, wherever the seller has not expressly bound himself to special activity in placing the chattels within the buyer's control and dominion, he will have performed his part by giving the buyer every opportunity to take possession,<sup>6</sup> which the nature and situation of the property fairly demand.<sup>7</sup>

1 See 1 Abbott's Law Dict. 360.

2 See *Bolin v. Huffnagle*, 1 Rawle, 9, 19; § 222, ON ACTUAL AND CONSTRUCTIVE DELIVERY.

3 See *Carpenter v. Graham*, 42 Mich. 191; *Webster v. Anderson*, 42 Mich. 554; *Chapman v. Searle*, 3 Pick. 38; 1 Corbin's Benjamin on Sales, §§ 174, 182; 2 Corbin's Benjamin on Sales, § 1044, n. 26, making these citations in support of text.

4 *Edwards v. Meadows*, 71 Ala. 42. And that though the purchaser's permitting the person in possession to use the machine for a definite time, as a matter of favor, would operate as a waiver of delivery, yet a mere submission to such use because of the person's refusal to give it up until certain work was done, would not so operate: *Edwards v. Meadows*, 71 Ala. 42.

5 See *Pratt v. Chase*, 40 Me. 269; *Phelps v. Cutler*, 4 Gray, 131; *Story on Sales*, § 311 a; 2 *Schouler on Personal Property*, § 393, making these citations in support of text. And consult *Campbell on Sales*, 347.



6 See *Hayden v. Demets*, 53 N. Y. 426 ; § 228, on DUTY TO DELIVER.

7 2 Schouler on Personal Property, § 393. Constructive delivery more fully discussed : Story on Sales, §§ 311 *a*, 312 *b* ; 2 Kent Com. 500-503. Waiver of objection to tender or otherwise of right to complete delivery : See *Hayden v. Demets*, 53 N. Y. 426 ; *Avery v. Willson*, 81 N. Y. 341 ; 37 Am. Rep. 503 ; 2 Schouler on Personal Property, § 394 ; referring, also, to *Alexander v. Gardner*, 1 Bing. N. C. 671 ; *Langdell's Cases on Sales*, 810 ; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86 ; *Knights v. Wiffen*, Law R. 5. Q. B. 660 ; *Langdell's Cases on Sales*, 766.

§ 242. *Delivery of bill of sale, etc.* — *Bill of sale of vessel at sea.* Among the *indicia* of title which the seller may deliver or tender in fulfillment of his obligation under the contract is the bill of sale of a vessel,<sup>1</sup> which has long been held a sufficient symbolical delivery of a vessel still at sea.<sup>2</sup>

*Bills of lading, delivery orders, etc.* So bills of lading,<sup>3</sup> and various instruments in the nature of delivery orders addressed to warehousemen and other third parties who hold possession of the goods,<sup>4</sup> will suffice when transferred in such form as to make the goods in another's custody deliverable to the buyer;<sup>5</sup> and the delivery or tender of such documents may constitute such a sufficient performance on the seller's part as to defeat any action against him for non-delivery of the goods;<sup>6</sup> though the seller's lien for non-payment,<sup>7</sup> or right of stoppage *in transitu*,<sup>8</sup> might not have been extinguished.<sup>9</sup>

*Where possession of goods given.* But wherever delivery of possession of corporeal chattels is given in conformity to the contract of sale, a bill of sale, except as to vessels, is unnecessary,<sup>10</sup> or at all events, serves merely as evidence of the transfer, in connection, it may be, with a receipt, or perhaps notice of the price;<sup>11</sup> though in modern practice where goods are put on water or railway transit, a bill of lading is to be delivered or transferred<sup>12</sup> as well as the goods themselves.<sup>13</sup>

1 See 2 Kent Com. 501 ; 1 Bouvier Law Dict. (14th ed.) 207.

2 See *Atkinson v. Mailing*, 2 Term Rep. 43 ; *Gardner v. Howland*, 2 Pick. 602 ; Story on Sales, § 311 ; 1 Schouler on Personal Property,

§ 305; 2 Schouler on Personal Property, § 392, making these citations in support of text. And consult Bennett's Benjamin on Sales, § 696, n. c.

3 See § 243, on DELIVERY OF BILLS OF LADING.

4 See chapter on DOCUMENTS OF TITLE.

5 2 Schouler on Personal Property, § 392.

6 See *Salter v. Woollams*, 2 Man. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Davis v. Jones*, 3 Houst. 68; *Hayden v. Demets*, 53 N. Y. 426; *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 498; *Gibson v. Stevens*, 8 How. 399; *McKee v. Garcelon*, 60 Me. 167; 11 Am. Rep. 200.

7 See subsequent chapter on SELLER'S LIEN.

8 See subsequent chapter on STOPPAGE IN TRANSITU.

9 2 Schouler on Personal Property, § 392. And consult Bennett's Benjamin on Sales, § 637.

10 See 1 Bouvier Law Dict. (14th ed.) 207. But where personal property is in the hands of a bailee, a transfer by bill of sale alone is good and valid even as against the creditors of the vendor: *Keil v. Harris*, 6 Atl. Rep. (Pa.) 750.

11 2 Schouler on Personal Property, § 392; citing, *Gatzweiler v. Morgner*, 51 Mo. 37. Compare 2 Kent Com. 501. No delivery of the personal property named in a formal bill of sale is necessary to pass the title as between the parties: *Philbrook v. Eaton*, 134 Mass. 398; citing, *Parsons v. Dickinson*, 11 Pick. 352; *Packard v. Wool*, 4 Gray, 307. Bill of parcels and lease back, insufficient to pass title as against innocent purchaser from seller: *Harlow v. Hall*, 132 Mass. 232.

12 See § 243, on DELIVERY OF BILLS OF LADING.

13 See Schouler on Bailments, under Carriers in General; *Barber v. Taylor*, 5 Mees. & W. 527; 2 Schouler on Personal Property, § 393, p. 396, n. 2, making these citations in support of statement in text.

§ 243. *Delivery of bills of lading.*—*As compliance with statute of frauds.* It has been held that a bill of lading is a symbol of the ownership of the goods covered by it, and that the transmission of a bill of lading amounts to the possession of the property described in it, and is a compliance with the statute of frauds as to the sale and delivery of property.<sup>1</sup>

*As transferring title, etc.* But bills of lading differ essentially from bills of exchange and other commercial negotiable instruments,<sup>2</sup> and even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner,<sup>3</sup> or affect his right to rescind the sale and stop the goods in transit.<sup>4</sup> For while possession of

a bill of lading or other document of like nature may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title,<sup>5</sup> nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner.<sup>6</sup>

*Reservation of control.* Where the shipper retains the right of disposing of the property while in the hands of the consignee, there is, of course, no delivery to the consignee;<sup>7</sup> and the object which the shipper usually has in taking the bill of lading in his own name, when he does so, is to enable him to retain such right.<sup>8</sup> But there is a delivery in such cases by the subsequent delivery of the indorsed bill of lading, so that the risk of damage from the elements should, in the absence of any agreement to the contrary, be borne by the consignee,<sup>9</sup> although there was no opportunity to inspect the goods at the time.<sup>10</sup>

1 First Nat. Bank v. McAndrews, 5 Mont. 323, 329; 51 Am. Rep. 51; 5 Pacif. Rep. 879.

2 Barnard v. Campbell, 55 N. Y. 456.

3 See Saltus v. Everett, 20 Wend. 267; 32 Am. Dec. 541.

4 Barnard v. Campbell, 55 N. Y. 456; Evansville etc. R. R. Co. v. Erwin, 84 Ind. 457, 466.

5 Barnard v. Campbell, 55 N. Y. 456.

6 Barnard v. Campbell, 55 N. Y. 456; as quoted, Evansville etc. R. R. Co. v. Erwin, 84 Ind. 457, 466. Tender of bill of lading drawn in triplicate: Sanders v. Maclean, Law R. 13 Q. B. D. 327. Indorsement and delivery for security: Burdick v. Sewell, Law R. 13 Q. B. D. 159. As transferring property under Louisiana laws: Allen v. Jones, 24 Fed. Rep. 11.

7 Reservation of control: See chapter on that subject.

8 Forchheimer v. Stewart, 65 Iowa, 594; 54 Am. Rep. 30. Hence where the seller proceeded at once to transfer the bill of lading or shipping receipt, taken in his own name and to his own order, to a bank as security for a sight draft for the price of the goods, the amount of such draft being credited to him in his bank account, it was held that there was no delivery made to the buyers by delivery to the carrier: Forchheimer v. Stewart, 65 Iowa, 594; 54 Am. Rep. 30.

9 Concerning risk in general: See under chapter on TRANSFER OF TITLE.

10 Forchheimer v. Stewart, 65 Iowa, 364; 54 Am. Rep. 30.

§ 244. **Delivery of warehouse receipts.**—*As symbolical delivery of property.* When the terms of a warehouse receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever the receipt may be indorsed, a symbolical delivery of the property may be effected by the assignment or delivery of the receipt, and the warehouseman becomes bailee to such assignee, in accordance with the terms of his contract.<sup>1</sup>

*Consent of bailee.* But when the receipt restricts the promise to deliver to the bailor personally, and not to deliver to his order,<sup>2</sup> a change in the possession of the property bailed cannot be effected by a mere assignment of the receipt, without the consent of the bailee thereto, so as to defeat the rights of subsequent attaching creditors of the bailor.<sup>3</sup>

1 Gill v. Frank, 12 Oreg. 507 ; 8 Pacif. Rep. 764.

2 As was the case in Solomon v. Bushnell, 11 Or. 277 ; 3 Pacif. Rep. 677.

3 Gill v. Frank, 12 Or. 507 ; 8 Pacif. Rep. 764, 766 ; quoting and approving, Hallegarten v. Oldham, 135 Mass. 1.

§ 245. **Excuses for failure to deliver, etc.**—*Refusal of tender.* Where the buyer, after a part of the grain sold was delivered, refused to receive any more of it, upon the ground that the time had expired within which it was required to be delivered by the terms of the contract, such refusal has been held to amount to a waiver on the buyer's part of any subsequent tender or offer to deliver.<sup>1</sup>

*Insolvency of purchaser.* And it has been considered that if after the making of an executory contract for the delivery of goods, the purchaser, who has not paid the contract price, becomes insolvent, the vendor may refuse to deliver without being liable therefor.<sup>2</sup>

*Freezing of river.* But performance of a contract to deliver corn is not excused in Louisiana<sup>3</sup> by the freezing

of a river on the eleventh day, when transportation could have been made in some other way.<sup>4</sup>

1 *Roberts v. Mazeppa Mill Co.* 30 Minn. 413, 415. And see *Cauda v. Wick*, 100 N. Y. 127.

2 *Ullman v. Babcock*, 63 Tex. 68, 71.

3 See La. Rev. Civ. Code, art. 1933, paragraphs 2 and 3.

4 *Engster v. West*, 35 La. An. 119; 48 Am. Rep. 232; distinguishing, *White v. Kearney*, 9 Rob. (La.) 495; *Police Jury v. Taylor*, 2 La. An. 272; *Lagrange v. Fowler*, 4 La. An. 243; *Bietry v. New Orleans*, 22 La. An. 149.

§ 246. *Relation to third parties.*—*More required than between the original parties.* The effect of delivery with reference to the rights, not of buyer and seller alone, but of third persons, such as attaching creditors<sup>1</sup> and subsequent purchasers, should be carefully distinguished from its effect as between the parties themselves.<sup>2</sup> For as between seller and buyer, property may often pass without actual delivery of the goods, while the seller may be estopped to deny the validity of his own sale,<sup>3</sup> and the seller performs his duty of delivery sufficiently<sup>4</sup> by tendering the subject-matter for acceptance.<sup>5</sup> But in cases which involve the rights of third persons, something more is usually required, comprising a complete delivery, acceptance by the buyer,<sup>6</sup> an actual and substantial change of possession between the parties,<sup>7</sup> and a transfer not only of property rights or *indicia*, but of the thing itself.<sup>8</sup>

*Bill of sale—Severance of grass.* Delivery of a bill of sale will not, independently of registry statutes, suffice as against third persons, where actual delivery is possible;<sup>9</sup> and severance of grass is necessary before delivery, since the article must exist as a chattel.<sup>10</sup>

*Delivery to transfer title.* In regard to delivery effecting the transfer of title, less might be required between third persons than between the parties themselves,<sup>11</sup> since a title might pass as against creditors of the seller,

where something further, such as an opportunity to inspect, might still be expected by the buyer, as between himself and the seller, in performance of the full engagement to deliver.<sup>12</sup>

*Notice to custodian.* When property sold in good faith is at the time in the care and custody of a third person, notice to such third person of the sale is sufficient to constitute a delivery, as to subsequent purchasers or attaching creditors.<sup>13</sup>

1 Sufficiency of delivery against creditors (case of nailing up holes in corn-crib): *Pope v. Cheney*, 27 N. W. Rep. (Iowa), 754, citing cases and discussing subject.

2 2 Schouler on Personal Property, § 395. And consult Bennett's Benjamin on Sales, § 675, n. d, pp. 781, 785.

3 See under chapter on TRANSFER OF TITLE.

4 See § 228, on DUTY OF DELIVERY.

5 2 Schouler on Personal Property, § 395.

6 Acceptance in general: See chapter on that subject.

7 Presumption of fraud upon creditors or third parties where a seller retains possession of the things sold: See under chapter on FRAUDULENT SALES.

8 2 Schouler on Personal Property, § 395, referring as to delivery against the seller's creditors, to *Bullard v. Wait*, 16 Gray, 55; *Veazie v. Somerby*, 5 Allen, 280; *Wright v. Vaughn*, 45 Vt. 369; *Garman v. Cooper*, 72 Pa. St. 32; *McKee v. Garcelon*, 60 Me. 165; 11 Am. Rep. 200; *Morgan v. Taylor*, 32 Tex. 363.

9 See *Burge v. Cone*, 6 Allen, 412; *Solomons v. Chesley*, 58 N. H. 238; *Dempsey v. Gardner*, 127 Mass. 381; 34 Am. Rep. 388; citing, *Carter v. Williard*, 19 Pick. 1; *Shumway v. Rutter*, 7 Pick. 56, 58; 19 Am. Dec. 340; and 8 Am. Dec. 443, 447; *Packard v. Wood*, 4 Gray, 307; *Rourke v. Bullens*, 8 Gray, 549; *Veazie v. Somerby*, 5 Allen, 280, 289; and distinguishing, *Tuxworth v. Moore*, 9 Pick. 347; 20 Am. Dec. 479; *Bullard v. Wait*, 16 Gray, 55; *Chapman v. Searle*, 3 Pick. 33; *Ingalls v. Herrick*, 108 Mass. 351; *Thorndike v. Bath*, 114 Mass. 116; 19 Am. Rep. 318; *Dugan v. Nichols*, 125 Mass. 43; *Hardy v. Potter*, 10 Gray, 89. But when personal property is in the hands of a bailee, a transfer by bill of sale alone is good and valid, even as against the creditors of the vendor: *Keil v. Harris*, 6 Atl. Rep. (Pa.) 750.

10 See *Lamson v. Patch*, 5 Allen, 586; 81 Am. Dec. 765; as stated, 2 Schouler on Personal Property, § 395, n. 3, whence paragraph derived, excepting mention of *Dempsey v. Gardner*, 127 Mass. 381; 34 Am. Rep. 388.

11 See citations in next note.

12 See *Hunter v. Wright*, 12 Allen, 548, as cited in support of text in 2 Schouler on Personal Property, § 395, which also refers to *Washburn Co. v. Russell*, 130 Mass. 543; *Wyoming Bank v. Dayton*, 102 U. S. 59.

13 *Lufkins v. Collins*, 7 Pac. Rep. (Idaho) 95. Relying upon Bennett's Benjamin on Sales, § 675, n. d; *How v. Taylor*, 52 Mo. 592;

Cofield v. Clark, 2 Colo. 101; Dempsey v. Gardner, 127 Mass. 381; 34 Am. Rep. 388. Holding that error arises from contradictory instruction that in order to constitute such delivery it is necessary that the seller, purchaser, and third party should all agree, and that such a charge falls within the rules as to the incurable character of inconsistent instructions, laid down in Mackey v. People, 2 Colo. 13; Rice v. Olin, 79 Pa. St. 351; Thompson's Charging the Jury, § 69; People v. Campbell, 30 Cal. 312.

§ 247. **Sufficiency of delivery against creditors.** — *Kind of possession necessary to be given.* The general rule is, that a sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale.<sup>1</sup> And in determining the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property, while no such change of possession as will defeat the fair and honest object of the parties is required.<sup>2</sup> A change in the location of the property is not always essential to protect the property against the creditors of the vendor, but if the purchase was in good faith, and for a valuable consideration,<sup>3</sup> followed by acts intended to transfer the possession as well as the title, and the vendee assumed such control of the property as to reasonably indicate a change of ownership, the delivery of possession cannot, as matter of law, be held insufficient, but the case should, under such circumstances, go to the jury to find whether the sale was in good faith or merely colorable.<sup>4</sup>

*Setting portion apart.* A setting apart of a portion of goods to be delivered under an entire contract vests title in the purchaser to such portion, as against a subsequent attaching creditor of the vendor, though it be not actually removed.<sup>5</sup>

*Thing not in existence, etc.* And a contract that all the colts to be foaled by certain mares sold by one party to another, and kept in the stables of the former

under the care of the latter, were to belong to the latter, is a valid contract of sale, and not void as against creditors for want of delivery.<sup>6</sup>

*Delivery before levy.* But a sale of personal property, not accompanied by an immediate delivery, is void as to existing creditors, though the goods are delivered before levy.<sup>7</sup> Where, however, the owner of wheat in bulk sells the same by parol, receiving at the same time, as part payment, his own promissory note from the vendee, and where transfer of the wheat is afterwards effected by locking the granary, and giving the key to the vendee, the transfer of the title and possession is complete, and a subsequent seizure by the sheriff under a writ of attachment by a creditor of the vendor is illegal, even where the sheriff had levied his writ, though he had performed no other act, before the transfer of the promissory note and the delivery of the key.<sup>8</sup>

*Other than actual.* There has been held to be a sufficient change of possession to pass property as against creditors, where one party indorsed certain notes for another, receiving payment therefor in corn, for which a bill of sale was executed, but this bill of sale proved unsatisfactory, and an oral sale of the corn was made, both parties going to the crib when the one formally delivered possession to the other, who nailed up certain holes in the crib.<sup>9</sup>

1 Crawford v. Davis, 99 Pa. St. 376, 378.

2 Crawford v. Davis, 99 Pa. St. 376, 378, citing illustrative case of Dualap v. Bournonville, 2 Casey, 72, and stating the same principle to be recognized in Born v. Shaw, 5 Casey, 288; McKibbin v. Martin, 14 Smith, P. F. 352; Evans v. Scott, 8 Norris, 136; Pearson v. Carter, 13 Norris, 156.

3 *Bona fide* purchasers in general: See chapter on that subject.

4 Crawford v. Davis, 99 Pa. St. 576, 579.

5 State v. Knapp etc. Co. 13 Mo. App. 467; citing, Aldridge v. Johnson, 7 El. & B. 885; Story on Sales, 299; Thompson v. Conover, 32 N. H. 466.



6 *Hull v. Hull*, 43 Conn. 250; 40 Am. Rep. 165. Relying for point that the doctrine as to retention of possession has no application where property not existing or already in possession of vendee, upon *Lucas v. Birdsey*, 41 Conn. 357; *Capron v. Porter*, 43 Conn. 389; *Spring v. Chipman*, 6 Vt. 662; *Bellows v. Wells*, 36 Vt. 599. Compare generally, *Hull v. Sigsworth*, 48 Conn. 258; 40 Am. Rep. 167; *Webster v. Anderson*, 42 Mich. 554; 36 Am. Rep. 452.

7 *Edwards v. Sonoma Valley Bank*, 59 Cal. 148; citing, *Watson v. Rogers*, 53 Cal. 401.

8 *Sharp v. Carroll*, 27 N. W. Rep. (Mich.) 832.

9 *Pope v. Cheney*, 27 N. W. Rep. (Iowa) 754, with n. 756. Case distinguishes *Boothby v. Brown*, 40 Iowa, 104; *Sutton v. Ballou*, 46 Iowa, 517; *McKay v. Clapp*, 47 Iowa, 418; *Smith v. Champney*, 50 Iowa, 174; *Hickok v. Buell*, 51 Iowa, 655; 2 N. W. Rep. 512; *Nuckolls v. Pence*, 52 Iowa, 581; 3 N. W. Rep. 631. So pointing out hogs which were to be taken in payment for services, but were to remain in pasture until there should be an opportunity for further selling them, has been held a valid delivery as against the seller's creditors: *Webster v. Anderson*, 42 Mich. 554; 36 Am. Rep. 452. Delivery of samples and bill of parcels: *Ingalls v. Herrick*, 108 Mass. 351; 11 Am. Rep. 360.

§ 248. **Delivery to carrier.**—*Putting goods in transit.* Delivery to the buyer's accredited agent is equivalent to delivery to the buyer himself.<sup>1</sup> And even if the seller be bound to send the goods, instead of delivering them upon his own premises,<sup>2</sup> the act of performance is usually completed<sup>3</sup> when he has put the goods in transit.<sup>4</sup>

*As delivery to buyer's agent.* For delivery to a common carrier<sup>5</sup> is presumed to be tantamount to delivery to the buyer's own agent;<sup>6</sup> though if the seller chooses to keep the carrier his own agent, for his better security or other cause, the act of delivery necessarily remains incomplete while this agency continues.<sup>7</sup>

*Buyer's directions, etc.* A delivery of goods to a common carrier in pursuance of the directions of the purchaser is a delivery to the purchaser;<sup>8</sup> and he is liable to the seller for the price, though they be lost by the negligence of the carrier before they reach him.<sup>9</sup> And where goods are forwarded by an express company marked C. O. D. by instructions of the purchaser, the sale is complete when the goods are delivered to the carrier.<sup>10</sup> But where a seller is to deliver specified

goods, such as merchantable ice, on shipboard at the place of shipment within a specified period, the buyer must first name the ship and give the seller notice of his readiness to receive the goods on board.<sup>11</sup>

*Delivery of goods and mailing of documents.* By the delivery of goods to a railway company to be carried and delivered to creditors, and the taking of the bill of lading for their benefit, and mailing it to them with the invoice or bill of sale, the company becomes the bailee of the goods for the creditors' use and benefit, and by such manifestations of the intention of the debtor, his right to the property, and authority over it, are for the time being at an end, and the title vests in the creditors, subject only to their refusal to accept the consignment when the facts come to their knowledge.<sup>12</sup>

*Delivery at wharf, etc.* In general, a delivery of goods to a common carrier, much more to one specially designated by the buyer,<sup>13</sup> is a delivery to the buyer.<sup>14</sup> But what amounts to a delivery to carriers may sometimes be a question of fact for a jury; though ordinarily, delivery at their wharf, freight-house, or warehouse, and bringing it to the notice of the servants of the carrier, should be so considered.<sup>15</sup>

*Place where sale complete.* Where the contract is silent on the subject, and there is nothing in the transaction indicating a different intention, and a manufacturer in one city receives through his agent residing in another an order for goods from a customer there, and fills the order by delivering the goods to a common carrier at the place of manufacture, consigned to such customer at his place of residence, or to such agent for him, the sale is complete and the title passes at the place of shipment,<sup>16</sup> even though the customer on receiving the goods at his place of residence pays to such agent there the purchase price.<sup>17</sup>

1 2 Schouler on Personal Property, § 396. And see Story on Sales, § 305; 2 Kent Com. 499; Bonner v. Marsh, 10 Smedes & M. 376; 48 Am. Dec. 754, 755.

2 See § 228, on DUTY TO DELIVER.

3 Compare Pilgreen v. State, 71 Ala. 368.

4 See 2 Kent Com. 499; 2 Schouler on Personal Property, § 396; citing, also, Thompson v. Baltimore etc. R. R. Co. 28 Md 396.

5 Common carriers in general: See 1 Bouvier Law Dict. (14th ed.) 299.

6 See Hobart v. Littlefield, 13 R. I. 341, 342; 2 Schouler on Personal Property, §§ 272, 336; Bennett's Benjamin on Sales, § 6.6; 2 Corbin's Benjamin on Sales, § 1940, n. 23. And consult Story on Sales, § 306; Bradford v. Marbury, 12 Ala. 520; 46 Am. Dec. 264, 263.

7 2 Schouler on Personal Property, § 396; citing, Dunlop v. Lambert, 6 Clark & F. 600; Wait v. Baker, 2 Ex. 1; Langdell's Cases on Sales, 942; Magruder v. Gage, 33 Md. 344; 3 Am. Rep. 177; Ranney v. Higby, 5 Wis. 62; Hall v. Gaylor, 37 Conn. 550; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Perkins v. Eckert, 55 Cal. 400.

8 Burton v. Baird, 44 Ark. 556; citing, State v. Carl, 43 Ark. 353; Bennett's Benjamin on Sales, §§ 181, 693.

9 Burton v. Baird, 44 Ark. 556.

10 Pilgreen v. State, 71 Ala. 368. And see State v. O'Neil, 58 Vt. 140; 56 Am. Rep. 557.

11 Walton v. Black, 5 Del. 149. Delivery "free on board," duty of purchaser: Clark v. Rose, 29 Up. Can. Q. B. 163, fully reviewing English cases.

12 Brown v. Bowe, 35 Hun, 483, 490. Relying upon alleged similar cases of Walley v. Montgomery, 3 East, 585; Langdell's Cases on Sales, 911; Anderson v. Clark, 2 Bing. 20; and Sturtevant v. Orser, 24 N. Y. 533; 82 Am. Dec. 321.

13 See Bradford v. Marbury, 12 Ala. 520; 46 Am. Dec. 264, 263.

14 Hobart v. Littlefield, 13 R. I. 341, 342. For unless the seller has contracted to deliver the goods to the buyer at some particular place or in some particular manner, everything that the seller has to do concerning delivery is then completed: Hobart v. Littlefield, 13 R. I. 341, 342; citing, Ludlow v. Bowne, 1 Johns. 115; Dunlop v. Lambert, 6 Clark & F. 600, 620; 2 Kent Com. 492, 494, 499; Garland v. Lane, 46 N. H. 245, 248; Hunter v. Wright, 12 Allen, 548.

15 Hobart v. Littlefield, 13 R. I. 341, 342. Yet a delivery at a wharf may be of itself an incomplete act, to be explained by what has preceded it, or by what takes place subsequently: Hobart v. Littlefield, 13 R. I. 341, 342; citing, The M. K. Rowley, 2 Low. 447; Columbia Saw Mill Co. v. Nettleship, 14 W. R. 3 Com. P. 499, 502; Packard v. Getman, 6 Cowen, 757; R. R. Co. v. Barrett, 36 Ohio St. 448.

16 Sarbecker v. State, 65 Wis. 171; 56 Am. Rep. 624.

17 Sarbecker v. State, 65 Wis. 171; 56 Am. Rep. 624, 626. Relying upon Fragano v. Long, 4 Barn. & C. 219; Langdell's Cases on Sales, 798; Ranney v. Higby, 4 Wis. 154; Somers v. McLaughlin, 57 Wis. 364; Comm. v. Farnum, 114 Mass. 267; Janney v. Sleeper, 30 Minn. 473; referring, also, to City of Kansas v. Collins, 8 Pac. Rep. (Kan.) 865; citing following cases as showing that the same principle has frequently been applied in the sale of liquors to a purchaser residing in a place where all such sales, or all such sales without license, were prohibited: Garbracht v. Com. 96 Pa. St. 449; 42 Am. Rep. 550; Finch v. Mansfield, 57 Mass. 89; Abberger v. Marin, 102 Mass. 70;

Brockway v. Maloney, 102 Mass. 308 ; Dolan v. Green, 110 Mass. 322 ; Frank v. Hoey, 128 Mass. 263 ; Hill v. Spear, 50 N. H. 253 ; 9 Am. Rep. 205 ; Tegler v. Shipman, 33 Iowa, 194 ; 11 Am. Rep. 118 ; Boothby v. Plaisted, 51 N. H. 436 ; 12 Am. Rep. 140 ; Shuenfeldt v. Junkerman, 20 Fed. Rep. 357. See, also, State v. O'Neil, 53 Vt. 140 ; 56 Am. Rep. 557.

‡ 249. *Seller's duties concerning such delivery.* — *Taking precautions for transportation.* The seller is not responsible for the risks of transit, if he has treated the carrier as the buyer's agent ;<sup>1</sup> but he is bound to pack in the customary and proper manner, and take other suitable precautions according to the character of the goods and their probable exposure ;<sup>2</sup> and he must not invite injury, nor perform negligently any duties incidental to transportation which his own contract has by fair inference placed upon him.<sup>3</sup>

*Mode of conveyance, etc.* So the seller is bound, in the absence of special stipulations in the contract prescribing the precise method of transportation, to forward the goods by the usual means of conveyance,<sup>4</sup> or at least by such a channel as he has reason to suppose the buyer prefers.<sup>5</sup>

*Notice of consignment.* And he should inform the buyer promptly of his consignment to a common carrier in all cases where he undertakes transportation from a distance.<sup>6</sup>

*Seller consigning to himself.* Where goods are sold upon an order from a buyer living at a place distant from the seller, and the latter undertakes to ship them, it is his duty to deliver them to the carrier, properly consigned ;<sup>7</sup> and if he consigns them to himself, the buyer is not bound to take them from the carrier, nor to make inquiries for them, but the seller is liable for the loss caused by the delay in receiving and caring for the goods at their destination.<sup>8</sup>

1 See 2 Kent Com. 499 ; Bennett's Benjamin on Sales, ‡ 693 ; 2 Corbin's Benjamin on Sales, ‡ 1040. Risks of transit in general : See 2 Schouler on Personal Property, ‡ 397 ; citing, Taylor v. Cole, 111

Mass. 363; *Vale v. Bayle*, Cowp. 294; 2 Kent Com. 500; *Arnold v. Prout*, 51 N. H. 387; *Waldron v. Romaine*, 22 N. Y. 368; *Sedgwick v. Cottenham*, 54 Iowa, 512.

2 2 Schouler on Personal Property, § 396.

3 See *Clarke v. Hutchins*, 14 East, 475; *Bull v. Robinson*, 10 Ex. 341; 2 Schouler on Personal Property, § 396; referring, also, to *Johnson v. Stoddard*, 100 Mass. 300.

4 Consult *Wheelhouse v. Parr*, 6 N. E. Rep. (Mass.) 787.

5 See *Comstock v. Affoelter*, 50 Mo. 411; 2 Schouler on Personal Property, § 306; citing, also, *Story on Sales*, § 305.

6 See 2 Kent Com. 500; *Bell on Sales*, 89; cited in support of text in 2 Schouler on Personal Property, § 396. And consult *Bradford v. Marbury*, 12 Ala. 520; 46 Am. Dec. 264, 263.

7 *Sohn v. Jervis*, 101 Ind. 578, 581.

8 *Sohn v. Jervis*, 101 Ind. 578, 581.

§ 250. **Directions concerning transportation.**—*In general.* In various instances goods ordered and contracted for are not delivered directly to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or where no agreement or directions given, to be transported in the usual mode; or the purchaser, being informed of the mode of transportation, assents to it; or there have been previous sales of other goods to the transportation of which, in a similar manner, the purchaser has not objected.<sup>1</sup> And in such cases the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*.<sup>2</sup>

*Changing directions, etc.* But this proposition assumes that proper directions and information are given the carrier as to forwarding the goods.<sup>3</sup> And if, while the goods are yet in the hands of the carrier, and before transportation of them has commenced, the vendor changes the directions as given to him by the purchaser, or authorizes the carrier to transport them in a different mode from that directed by the purchaser, and loss has

thereby occurred, the vendor cannot claim that the goods were delivered by him to the purchaser.<sup>4</sup>

1 *Wheelhouse v. Parr*, 6 N. E. Rep. 787; Sup. Jud. Ct. Mass. May 8, 1886.

2 *Wheelhouse v. Parr*, 6 N. E. Rep. 787; and see cases cited in next note.

3 See *Whiting v. Farrand*, 1 Conn. 60; *Quimby v. Carr*, 7 Allen, 417; *Finn v. Clark*, 10 Allen, 484; *Same v. Same*, 12 Allen, 522; *Downer v. Thompson*, 2 Hill, 137; *Langdell's Cases on Sales*, 803; *Foster v. Rockwell*, 104 Mass. 170; *Odell v. Boston etc. R. R.* 100 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252.

4 *Wheelhouse v. Parr*, 6 N. E. Rep. 787, n. 789. By continuing to exercise dominion over them, and by giving a new direction, impliedly withdrawing the directions previously given, he is precluded from asserting that he has made a complete delivery by his original act, as the change in the relation given relates back to and qualifies the original delivery: *Wheelhouse v. Parr*, 6 N. E. Rep. 787, n. 789.

§ 251. *Delivery to warehouseman.*—*Of goods boxed, marked, etc.* The same principle of agency<sup>1</sup> which applies to a carrier may likewise be invoked in case delivery is made to a warehouseman;<sup>2</sup> and hence, tobacco, which has been paid for in advance, may be boxed by the seller, marked with the buyer's name, and delivered to a warehouseman<sup>3</sup> to be kept for the buyer,<sup>4</sup> this being done in pursuance of the contract of sale, and in full performance of the seller's undertaking.<sup>5</sup>

*Warehouseman as custodian for seller.* But a warehouseman who holds goods for the seller, in the first place, is usually regarded as the seller's agent until he attorns over in some way to the buyer,<sup>6</sup> or else yields up his custody altogether.<sup>7</sup>

1 Agency in general: 1 Bouvier Law Dict. (14th ed.) 99.

2 2 Schouler on Personal Property, § 397.

3 Warehouseman in general: 2 Bouvier Law Dict. (14th ed.) 650.

4 See citations in next note.

5 See *Hunter v. Wright*, 12 Allen, 548; *Means v. Williamson*, 37 Me. 556; *Williams v. Lerch*, 56 Cal. 330; as cited in support of text, in 2 Schouler on Personal Property, § 397.

6 See citations in next note.

7 See *Knights v. Wiffen*, Law R. 5 Q. B. 660; *Langdell's Cases on Sales*, 766; *Scudder v. Worster*, 11 Cush. 573; *Langdell's Cases on Sales*, 783; 2 Schouler on Personal Property, § 385, and § 397; citing, also, in support of text, *Boswell v. Green*, 1 Dutch. 390; *Shepardson v. Cary*, 29 Wis. 34.

§ 252. *Inspection and acceptance.*—*Receipt and acceptance.* Where an agent comes specially accredited from the buyer to receive the goods,<sup>1</sup> the seller should deal with him according to the scope of his powers.<sup>2</sup> And while the buyer may empower any one not only to receive the goods as agent, but to make acceptance<sup>3</sup> in his behalf, a common carrier<sup>4</sup> is not ordinarily to be regarded as agent for the buyer to any such extent, but only for receiving the goods.<sup>5</sup>

*Buyer's right of inspection.* Inspection of goods supplied to order, for ascertaining that they conform to the contract, which is no part of a carrier's duty, is a right reserved to the buyer,<sup>6</sup> and to be regarded by the seller, unless the opportunity has been taken, or waived on the buyer's behalf before the goods reach him.<sup>7</sup> And the rule that in offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract,<sup>8</sup> has been applied where the buyers received notice that the goods were at a certain wharf ready for delivery on payment of the price, but on going there and making application to inspect the goods, were shown two closed casks, said to contain them, which the persons in charge refused to allow to be opened.<sup>9</sup>

1 Walk. Am. Law (4th ed.) §§ 115-118. Evidence concerning agency: 2 Greenleaf on Evidence, §§ 59-68. Agent in general: See 1 Bouvier Law Dict. (14th ed.) 100.

2 2 Schouler on Personal Property, § 397. Extent of authority of agents: 1 Bouvier Law Dict. (14th ed.) 101.

3 Acceptance in general: See subsequent chapter on that subject.

4 Common carriers in general: 1 Bouvier Law Dict. (14th ed.) 299.

5 See *Astey v. Emery*, 4 Maule & S. 262; *Langdell's Cases on Sales*, 114; *Meredith v. Meigh*, 2 El. & B. 364, 370; *Langdell's Cases on Sales*, 203; *Bennett's Benjamin on Sales*, § 160, citing other cases in relation to the statute of frauds; 2 Schouler on Personal Property, § 397, making these citations in support of text, and referring for divergent decision to *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721.

6 See *Campbell on Sales*, 307; *Bennett's Benjamin on Sales*, § 701.

7 See 2 Schouler on Personal Property, § 397 ; citing, *Isherwood v. Whitmore*, 11 Mees. & W. 347.

8 See *Croninger v. Crocker*, 62 N. Y. 151.

9 *Isherwood v. Whitmore*, 11 Mees. & W. 347 ; as stated, *Bennett's Benjamin on Sales*, § 695 ; referring, also, to *Startup v. McDonald*, 6 Man. & G. 593 ; *Boothby v. Scales*, 27 Wis. 626.

‡ 253. **Delivery to pass title.**—*Necessity of.* The general rule is said to be, that delivery of possession is necessary to the conveyance of a title to personal chattels, as against every one except the vendor ;<sup>1</sup> and a subsequent purchaser, with no notice of a prior sale, receiving possession, has a better title than one who has before purchased the same thing with no delivery of possession.<sup>2</sup>

*Buyer's possession for purposes of separation.* If the vendee, in the sale of a part of an entire mass of bricks, is allowed to take possession of the whole to enable him to separate the part purchased, the title passes according to the sale as between the parties.<sup>3</sup>

*When question of fact.* On an oral sale of lumber, of unknown quantity, at an agreed price per thousand, nothing being said about measuring it, the question whether there was a delivery intended to pass title or not is one of fact.<sup>4</sup>

*Though pretense of right to return.* There has been held to be a valid sale and delivery of a horse where a present sale having been agreed upon, payment to be made at a future time, the vendor gave the vendee an oral order upon the person in charge of the horse to let the vendee take it, and on the following day the vendee, without disclosing the bargain made with the vendor, and without notice to the vendor of any such view of the contract, took the horse from the person in charge, giving him to understand that he had got the horse from the vendor on trial, but returned the horse on the same day to the person previously in charge of it.<sup>5</sup>



1 *Crawford v. Forristall*, 58 N. H. 114. Counting measurement, etc.: See *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55; *Hahn v. Fredericks*, 30 Mich. 223; 18 Am. Rep. 119; *Pittsburg etc. Ry. Co. v. Heck*, 50 Ind. 303; 19 Am. Rep. 713; *Thorndike v. Bath*, 114 Mass. 116; 19 Am. Rep. 318.

2 *Crawford v. Forristall*, 58 N. H. 114; citing, 1 *Parsons on Contracts*, 529; *Ricker v. Cross*, 5 N. H. 570; *Summway v. Rutter*, 7 Pick. 56; *Jewett v. Warren*, 12 Mass. 300; *Lanfear v. Sumner*, 17 Mass. 110.

3 *Lamprey v. Sargent*, 58 N. H. 241, 242; citing, *Story on Sales*, 314 n. 3; *Weld v. Cutter*, 2 Gray, 195; *Damon v. Osborne*, 1 Pick. 476.

4 *Morgan v. King*, 28 W. Va. 1; 57 Am. Rep. 634, reviewing many cases relating to executory sales. But see as to various sense of word "delivery", *Morse v. Sherman*, 106 Mass. 430, 433; section on SCOPE OF TERM "DELIVERY."

5 *Somers v. McLaughlin*, 57 Wis. 358; 15 *The Reporter*, 358, holding that the intention of the parties at the time as to the delivery must prevail, even if there be something yet to be done to complete it, and citing, *Sewell v. Eaton*, 6 Wis. 490; *Ganson v. Madigan*, 9 Wis. 146; *Pitts v. Owen*, 9 Wis. 152; *Cotterill v. Stevens*, 10 Wis. 422; *Sanborn v. Hunt*, 10 Wis. 437; *Webber v. Roddis*, 22 Wis. 61; *Janyrin v. Maxwell*, 23 Wis. 51; *McConnell v. Hughes*, 29 Wis. 537; *Morrow v. Campbell*, 30 Wis. 90; *Chamberlain v. Dickey*, 31 Wis. 63; *Pike v. Vaughn*, 39 Wis. 499; *Fletcher v. Ingram*, 46 Wis. 191; *Kirby v. Johnson*, 22 Mo. 354; *Henline v. Hall*, 4 Ind. 189; *Gough v. Edelen*, 5 Gill, 101; *Foster v. Ropes*, 111 Mass. 10.

§ 254. Various points concerning delivery.—*Mode of performance, etc.* All incidents attending the act of delivery follow the principal thing;<sup>1</sup> and the mode of performance should be throughout according to the understanding of the parties, if mutually expressed;<sup>2</sup> and in whatever respect the method of delivery may have been left in doubt, full scope will be allowed to the true purpose of the transaction, aided by circumstances.<sup>3</sup>

*Incidental expenses.* Where a cargo was sold "from the deck," this was held to mean that the seller should pay all that was necessary in order to enable the buyer to remove the cargo from the deck;<sup>4</sup> and where wool lying in bulk on the vendor's premises was sold, payable on delivery by weight, the vendor was not allowed, in the absence of an express agreement, to recover the cost of labor, etc., in putting the unweighed wool into sacks furnished by the purchaser.<sup>5</sup>

*Proof of usage.* Usage may give precision to a point which in terms has been left undefined,<sup>6</sup> so far as it may

be assumed that the parties knew of its existence and contracted in reference to it;<sup>7</sup> and upon evidence of usage, the Supreme Court of the United States has held that a contract to deliver so many bushels of "first quality clear barley," meant to deliver the barley in sacks, where the contract did not state whether the grain was to be delivered in sacks or loose;<sup>8</sup> but evidence has been held inadmissible to prove a usage for the vendor of sheep to shear them and appropriate the wool before delivery.<sup>9</sup>

*Shipping article, etc.* Shipping an article to a party, and painting his name upon it, may create a strong inference of sale to him, but the act may be susceptible of explanation consistently with the ownership of the party delivering.<sup>10</sup>

*Allowing article to remain, etc.* And allowing a manufactured article to remain on the premises of the party for whom it was made, after demand for the price, is not in law an unconditional delivery, but merely slight evidence thereof, and does not make the article the property of such party.<sup>11</sup>

*Province of court and jury.* When there is no dispute as to the facts, the question of delivery is one of law, but where there is a conflict in the evidence, it is a question of fact for the jury.<sup>12</sup>

1 Incident in general: 1 Bouvier Law Dict. (14th ed.) 695.

2 2 Schouler on Personal Property, § 398. Tender of second delivery within time limited by contract sustained, though first tender properly rejected as not in accordance with the contract: *Borrowman v. Free*, Law R. 4 Q. B. D. 500; 29 Eng. Rep. 40; as stated, Bennett's Benjamin on Sales, § 697. Seller's responsibility as to a chattel sold but not delivered: 2 Schouler on Personal Property, § 400; citing, *Story on Sales*, §§ 300, 394; *McKay v. Hamblin*, 40 Miss. 472.

3 2 Schouler on Personal Property, § 398; referring in support of paragraph, to *Metz v. Albrecht*, 52 Ill. 491; *Robinson v. United States*, 13 Wall. 363; *Story on Sales*, § 388.

4 *Playford v. Mercer*, 22 L. T. N. S. 41.

5 *Cole v. Kew*, 20 Vt. 21. See Bennett's Benjamin on Sales, §§ 697, 698, so stating these cases.

6 Usage in general: 2 Bouvier Law Dict. (14th ed.) 627.

7 2 Schouler on Personal Property, § 398.

8 2 Schouler on Personal Property, § 398, p. 401, n. 2; referring, also, to *Steel Works v. Dewey*, 37 Ohio St. 242; *Shepard v. Lynch*, 26 Kan. 377.

9 *Groat v. Gile*, 51 N. Y. 431; as stated, *Bennett's Benjamin on Sales*, § 638.

10 *Page v. Smith*, 10 Pacif. Rep. 833; Sup. Ct. Oreg. May 3, 1886.

11 *Fogg v. Millis*, 138 Mass. 443, 445. Under a contract for the purchase of a reaping machine, the delivery will not be complete until the different parts, which none but an expert can put together, have been set up so as to form a machine: *Wood Mowing Machine Co. v. Gaertner*, 30 N. W. Rep. (Mich.) 106.

12 *Glass v. Gelvin*, 80 Mo. 297; citing on general principle, *Howdlett v. Tallman*, 14 Me. 400; *Hatch v. Bayley*, 12 Cush. 29; *Williams v. Gray*, 39 Mo. 201.

## CHAPTER XVIII.

### ACCEPTANCE.

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§ 255. *Buyer's duties in general.* — *Acceptance and payment.* In contracts of sale of personal property, the two leading obligations imposed upon the buyer are acceptance of the chattels,<sup>1</sup> and payment<sup>2</sup> for them.<sup>3</sup>

*Obligations not always passive.* The passive scope of the term "acceptance," however, while it may sufficiently indicate the buyer's attitude in cases in which the seller is bound to deliver not to a carrier only, but to the buyer's own door, at his house or place of business,<sup>4</sup> does not adequately cover the common cases where the buyer is presumed to be under an obligation to go to the seller and fetch the property,<sup>5</sup> or where the goods delivered are in the custody of a third person, and the buyer is presumably bound to procure a sub-delivery upon a delivery order or other suitable document of title<sup>6</sup> from the seller.<sup>7</sup>

*When acceptance unnecessary.* The subject-matter sold may also, at the time of the bargain, be already in

the buyer's custody, so that neither formal delivery<sup>8</sup> nor formal acceptance is necessary<sup>9</sup> to effect a complete transfer of the title.<sup>10</sup>

*Relation to delivery, etc.* But as delivery and acceptance are concurrent conditions,<sup>11</sup> the vendee's duty of acceptance depends altogether upon the sufficiency of the delivery offered by the vendor.<sup>12</sup> And the buyer is not bound, though such action might accommodate, to select his own goods from a larger quantity offered him, or to accept part performance, or to wait unreasonably long at his place of business in order that the delivery may be complete, and all be found satisfactory.<sup>13</sup>

1 See succeeding portions of chapter.

2 See next chapter on that subject.

3 2 Schouler on Personal Property, § 402. And see Bennett's Benjamin on Sales, § 699.

4 See § 229, on PLACE OF DELIVERY.

5 See next section on FETCHING GOODS. And compare § 228, on DUTY TO DELIVER.

6 See chapter on DOCUMENTS OF TITLE.

7 2 Schouler on Personal Property, § 403. If it was mutually agreed that the buyer should name the place of delivery, he must do so in due time, or the seller's offer of readiness to perform will put him in default: *Hunter v. Wetsell*, 84 N. Y. 549; 38 Am. Rep. 544; as stated, 2 Schouler on Personal Property, § 403, p. 404, n. 2, which also refers to *Greaves v. Ashlin*, 3 Camp. 426; *Denman v. Cherokee Iron Co.* 56 Ga. 319.

8 Delivery in general: See preceding chapter on that subject.

9 See § 239, on MODE OF MAKING DELIVERY.

10 2 Schouler on Personal Property, § 403. Transfer of title: See previous chapter on that subject.

11 See Campbell on Sales, 280.

12 See Bennett's Benjamin on Sales, § 701.

13 See *Startup v. McDonald*, 6 Man. & G. 593; *Hart v. Mills*, 15 Mees. & W. 85; *Kein v. Tupper*, 52 N. Y. 550; as cited in support of text in 2 Schouler on Personal Property, § 406.

§ 256. *Fetching goods. — As buyer's duty.* When the vendor has tendered delivery, if there be no stipulated place of delivery, and no special agreement that the vendor is to send the goods, the buyer must fetch them;<sup>1</sup> for it is settled law,<sup>2</sup> that the vendor need not in an

action against the buyer aver nor prove anything more than his readiness and willingness to deliver on payment of the price;<sup>3</sup> and if, in an action for goods sold and delivered, the plaintiff proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the defendant.<sup>4</sup>

*Within reasonable time.* Furthermore, if the vendee make default in fetching away goods within a reasonable time<sup>5</sup> after the sale, upon the request made by the vendor,<sup>6</sup> the vendee will be liable for warehouse rent and other expenses growing out of the custody of the goods, or in an action for damages, if the vendor be prejudiced by the delay,<sup>7</sup> though what is a reasonable time is a question for a jury under all the circumstances of the case.<sup>8</sup>

1 See § 228, on DUTY TO DELIVER. And consult Story on Sales, 404; 2 Corbin's Benjamin on Sales, § 897, n. 23; § 1018, n. 6; § 1025, n. 10; and § 1049, n. 1.

2 According to Bennett's Benjamin on Sales, § 699.

3 See Jackson v. Alloway, 6 Man. & G. 942; Boyd v. Lett, 1 Com. B. 222; Lawrence v. Knowles, 5 Bing. N. C. 399; Medina v. Norman, 9 Mees. & W. 820; Spotswood v. Barrow, 1 Ex. 804; Cort v. Ambergate Ry. Co. 17 Q. B. 127; 20 Law J. Q. B. 460; Baker v. Firminger, 28 Law J. Ex. 130; Cutter v. Powell, 2 Smith's Leading Cases, 1, notes; Ruffee v. United States, 15 Ct. of Cl. 291.

4 Nichols v. Morse, 100 Mass. 523; as stated, Bennett's Benjamin on Sales, § 699, n. a; referring, also, to Pacific Iron Works v. Long Island R. R. Co. 62 N. Y. 272; Washburn Iron Co. v. Russell, 130 Mass. 543; Sedgwick v. Cottingham, 54 Iowa, 512; Wright v. Weed, 6 Up. Can. Q. B. 140; Supple v. Gilmour, 5 Up. Can. C. P. 318. And see 2 Corbin's Benjamin on Sales, § 1051, n. 5; citing, Burton v. McKelway, 22 N. J. L. 165.

5 Reasonable time: See Bass v. White, 65 N. Y. 565; Pinney v. St. Paul R. R. 19 Minn. 251; Stange v. Wilson, 17 Mich. 342, 348; 2 Corbin's Benjamin on Sales, § 1038, n. 2; citing, also, Corn v. Spaulding, 47 Mich. 162.

6 Compare Jones v. Gibbons, 8 Ex. 920.

7 See Greaves v. Ashlin, 3 Camp. 426; Bloxam v. Sanders, 4 Barn. & C. 941; Ross' Leading Cases, 48; Denman v. The Cherokee Iron Co. 56 Ga. 319; all cited in support of text in Bennett's Benjamin on Sales, § 700. And consult Story on Sales, § 404.

8 Buddle v. Green, 3 Hurl. & N. 906; 27 Law J. Ex. 33; Bennett's Benjamin on Sales, § 700; referring, also, to Howe v. Huntington, 15 Me. 350.

§ 257. *Acceptance in general.*—*Supplementing seller's performance.* Whatever be the nature or situation of the property bargained for, the duties of buyer<sup>1</sup> and seller are reciprocal;<sup>2</sup> and the measure of the buyer's duty of acceptance must be according to the plain intent of the contract,<sup>3</sup> his part being to fill out what the seller's performance has left incomplete toward effecting a legal transfer of possession and possessory rights.<sup>4</sup>

*Taking and not merely receiving, etc.* His duty of acceptance may bind him to take, and not merely to receive,<sup>5</sup> though he may have to do neither;<sup>6</sup> but such as the contract makes it, he must perform his obligation with zeal and discretion.<sup>7</sup>

*Restrictions on obligations.* He is not bound, however,<sup>8</sup> to accept goods in a closed cask which the vendor refuses to open;<sup>9</sup> nor to remain at his place of business after sunset on the day fixed for delivery, nor even if he happens to be there after sunset, to accept unless there be time before midnight for inspecting and receiving the goods;<sup>10</sup> nor to select the goods bought out of a larger quantity, or a mixed lot that the vendor had sent him;<sup>11</sup> nor, on a sale of rice in "double bags," to accept the goods in single bags, where there was proof that this mode of packing rice made a difference in the sale.<sup>12</sup>

1 See preceding section on BUYER'S DUTIES IN GENERAL.

2 2 Schouler on Personal Property, § 403.

3 Intention governs: See under chapter on TRANSFER OF TITLE.

4 2 Schouler on Personal Property, § 403. Right of possession: See under chapter on TRANSFER OF TITLE.

5 See next section on DISTINCTION BETWEEN ACCEPTANCE AND RECEIPT. Notice to accept: See *Cameron v. Wells*, 30 Vt. 633; *Edwards v. Hartt*, 66 Ill. 71; 2 Corbin's Benjamin on Sales, § 1043, n. 3 (citing these cases); § 1018, n. 8; and § 1023, n. 11.

6 See subdivision of preceding section discussing case where goods already in buyer's custody.

7 2 Schouler on Personal Property, § 403.

8 According to Bennett's Benjamin on Sales, § 701. And see 2 Corbin's Benjamin on Sales, § 1049.

9 See *Isherwood v. Whitmore*, 10 Mees. & W. 757 ; 11 Mees. & W. 347.

10 See *Startup v. McDonald*, 6 Man. & G. 593.

11 See *Dixon v. Fletcher*, 3 Mees. & W. 146 ; *Hart v. Mills*, 15 Mees. & W. 85 ; *Nicholson v. Bradfield Union*, Law R. 1 Q. B. 620 ; 35 Law J. Q. B. 176 ; *Levy v. Green*, 8 El. & B. 575 ; 1 El. & E. 969 ; 27 Law J. Q. B. 111 ; 28 Law J. Q. B. 319 ; *Tarling v. O'Riorden*, 2 Ir. Law Rep. 82.

12 See *Makin v. London Rice Mills Co.* 20 L. T. N. S. 705. And the buyer is not bound to comply with the contract at all, but may rescind it, if the seller refuse to let him compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time : See *Lorymer v. Smith*, 1 Barn. & C. 1 ; *Toulmin v. Headley*, 2 Car. & K. 157.

§ 258. *Distinguished from receipt.*— *Statement of distinction.* Acceptance is to be distinguished<sup>1</sup> from the mere receipt of the thing,<sup>2</sup> as legal acceptance under a sale includes the idea of a receipt, but superadds thereto the element of intention to retain in accordance with the contract,<sup>3</sup> that is to say, as the new owner by purchase.<sup>4</sup> Acceptance signifies not only that the thing is received, but that it is received in satisfactory fulfillment of the seller's obligation to deliver, as a full compliance with the bargain previously entered into.<sup>5</sup>

*Application of distinction.* And under the well-settled distinction between receipt and acceptance, the right to accept or reject ore after receipt by delivery on board cars, if on testing it proved deficient in the guaranteed percentage of zinc, is given by a contract which provided that the buyers were bound to take the ore only in case it proved to contain such percentage.<sup>6</sup>

*Receipt becoming acceptance.* But receipt becomes acceptance<sup>7</sup> if the right of rejection is not exercised within a reasonable time,<sup>8</sup> or if any act be done by the buyer which he would have no right to do unless he were owner of the goods.<sup>9</sup>

1 See 1 Bouvier Law Dict. (14th ed.) 47

2 See Bennett's Benjamin on Sales, § 703 ; referring to *Fitzsimmons v. Woodruff*, 1 N. Y. Sup. Ct. 3, 4 ; *Knoblauch v. Kronschnabel*, 18 Minn. 309 ; *Brown v. Corp. of Lindsay*, 35 Up. Can. Q. B. 509.



3 See 2 Parsons on Contracts, 221; 1 Bouvier Law Dict. (14th ed.) 47; Campbell on Sales, 169; quoting, *Cowes v. Pontifex*, 3 Fost. & F. 739

4 2 Schouler on Personal Property, § 404. And this latter is after all the strong element, since while an actual receipt by virtue of the purchase is not always requisite, there must in every case exist the intention to retain in accordance with the bargain, else the contract has never been completely executed: 2 Schouler on Personal Property, § 404. Acceptance is the receipt of a thing offered by another, with an intention to retain it, indicated by some act sufficient for the purpose: 2 Parsons on Contracts, 221.

5 2 Schouler on Personal Property, § 404. And see 1 Bouvier Law Dict. (14th ed.) 47. So under statute of frauds: See Campbell on Sales, 169; quoting Blackburn on Sales, p. 24.

6 Trotter v. Hecksher, 4 Atl. Rep. (N. J.) 83.

7 According to Bennett's Benjamin on Sales, § 703.

8 See 1 Chitty on Contracts (11th Am. ed.), 651; *Bianchi v. Nash*, 1 Mees. & W. 544; *Beverly v. Lincoln Gas Light Co.* 6 Ad. & E. 329; *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187; *Coventry v. M'Eniry*, 13 Ir. Com. Law Rep. 160; *Lewis v. Gibbons*, Black. D. & O. 62; *Cox v. Jones*, 24 Up. Can. Q. B. 81; *Gordon v. Waterous*, 36 Up. Can. Q. B. 321; *Treadwell v. Reynolds*, 39 Conn. 31; *Boughton v. Standish*, 48 Vt. 594; *Water's Heater Co. v. Mansfield*, 48 Vt. 378; *Stafford v. Pooler*, 67 Barb. 143; *Greenthal v. Schneider*, 53 How. Pr. 133; *Delamater v. Chappell*, 48 Md. 244; *Doane v. Dunham*, 79 Ill. 131; *Pennell v. McAfferty*, 84 Ill. 364; *Hirschhorn v. Stewart*, 49 Iowa, 418; *Henkel v. Walsh*, 41 Mich. 664; *Shipman v. Graves*, 41 Mich. 675.

9 See *Bogue v. Newcomb*, 1 N. Y. Sup. Ct. 251; *Neaffle v. Hart*, 4 Lans. 4; *Watkins v. Paine*, 57 Ga. 50; *Hamilton v. Myles*, 24 Up. Can. Com. P. 309; *Wilds v. Smith*, 2 Ont. App. 8.

§ 259. **Receiving or taking possession.**—*Buyer's duty concerning.* If the seller has duly tendered delivery of the goods,<sup>1</sup> the buyer must, with reasonable promptness, put himself where the goods shall come into his own possession without further risk or trouble, as by sending for them,<sup>2</sup> or at least holding himself in readiness to receive them at the proper time, in the proper place, and in the proper manner, according to the terms of the bargain.<sup>3</sup>

*Delay in.* And for unreasonable delay in receiving or taking possession he subjects himself to liability for such extra charges and expenses as may be incurred in the custody of the goods, besides running the risk of damage and loss;<sup>4</sup> though for a simple, unexplained delay on the buyer's part in coming to take the thing

away, the seller would hardly be justified in treating the bargain as rescinded.<sup>5</sup>

1 See § 239, on MODE OF MAKING DELIVERY.

2 See § 256, on FETCHING GOODS.

3 2 Schouler on Personal Property, § 405.

4 See Story on Sales, § 404; Bennett's Benjamin on Sales, § 700; § 256, on FETCHING GOODS.

5 2 Schouler on Personal Property, § 405.

§ 260. *Right of inspection.*—*After receipt.* The buyer is not obliged to carry his receipt of possession to the full extent of acceptance, without that inspection which shall show whether the chattels tendered by the seller are such as were bargained for, where, as in the case of unascertained chattels made or supplied to order,<sup>1</sup> such inspection must necessarily await the actual receipt of the goods.<sup>2</sup>

*Illustrations.* Thus, where the bulk is delivered under a sale by sample, the buyer ought to be allowed an opportunity to compare and ascertain for himself the substantial correspondence of bulk and sample;<sup>3</sup> and even if specific goods are mutually agreed upon, the seller cannot rightfully deprive the buyer of the opportunity, upon the arrival of the goods, to remove the wrappers, or break the package, so as to make sure that the identical thing is brought him.<sup>4</sup>

*Mode of examination of wool.* But where wool was purchased "subject to grader's rejection," such term meaning that the wool was subject to examination by wool-graders, and to rejection or allowance on contract price for such wool as was of an inferior quality, it was held that if the examination of the wool was not conducted fleece by fleece as required by the custom of the place, but by ripping open the sacks, the vendees, after retention of the wool, were liable for the contract price, although they subsequently, after the vendor's refusal

to abide by their rejection, offered to have it graded fleece by fleece.<sup>5</sup>

1 See chapter on EXECUTORY SALES.

2 Schouler on Personal Property, § 406. The buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract: Bennett's Benjamin on Sales, § 701, n. d; citing, Pew v. Lawrence, 27 Up. Can. C. P. 402; Croninger v. Crocker, 62 N. Y. 151; Corrigan v. Sheffield, 10 Hun, 227; Thobburonn v. Lewis, 43 Mich. 635; Raffee v. United States, 15 Ct. of Cl. 291; and quoting, Pease v. Copp, 67 Barb. 132. And see 2 Corbin's Benjamin on Sales, § 1042, n. 25, and § 1049, n. 4; citing, Shields v. Reibe, 9 Ill. App. 598.

3 See Lorymer v. Smith, 1 Barn. & C. 1; Couston v. Chapman, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187; Doane v. Dunham, 79 Ill. 131.

4 See Isherwood v. Whitmore, 10 Mees. & W. 757; so cited, 2 Schouler on Personal Property, § 406, whence paragraph derived. Right to weigh or measure goods in course of inspection: 2 Schouler on Personal Property, § 406; referring to Pettit v. Mitchell, 4 Man. & G. 819; stated at length in Bennett's Benjamin on Sales, § 702.

5 Meherin v. Ball, 8 Pac. Rep. (Cal.) 886; 21 The Reporter, 309.

§ 261. What constitutes acceptance.—*In general.* Acceptance of goods in the fullest sense may be expressed by words or acts,<sup>1</sup> and it is also inferable from the facts.<sup>2</sup>

*Detention of goods.* Thus, a detention of custody by the buyer becomes, by lapse of time, decisive to show acceptance, since if the buyer means for cause not to accept the goods, it is his duty to promptly reject them, and to throw them back upon the seller;<sup>3</sup> and hence a retention of wool for three days before objecting to delay in delivery, and for six weeks before finding out the seller's address, and notifying him of the refusal to accept, has been held to render the buyer liable for the price;<sup>4</sup> and a period of seven weeks, when one would have sufficed, has been thought too long for examining large lots of wine sold by sample.<sup>5</sup>

*Exercise of acts of ownership.* Still more conclusive upon the buyer is a detention of custody accompanied by the exercise of acts of ownership over the chattels, such as the attempt to sell the property over as one's own before giving notice of non-acceptance;<sup>6</sup> and even where one entirely disclaims that he has ordered goods,

he becomes liable if he exercises acts of ownership over them, instead of returning them, or notifying the sender to take them.<sup>7</sup>

*Acts conflicting with words.* But whether the buyer has accepted the goods or not, must depend upon all the facts, and not upon words alone, which are not borne out by the buyer's own conduct.<sup>8</sup> Nor can the buyer's refusal of acceptance avail him when he has exposed himself to the imputation of playing fast and loose, declaring that he will not accept the goods, but at the same time preventing the seller from dealing with them as his own.<sup>9</sup>

1 See 1 Bouvler Law Dict. (14th ed.) 47.

2 2 Schouler on Personal Property, § 307, referring for evidence held insufficient to establish a knowing acceptance by the buyer, to *Gowing v. Knowles*, 118 Mass. 232.

3 See *Bianchi v. Nash*, 1 Mees. & W. 545; *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187; *Treadwell v. Reynolds*, 39 Conn. 31; *Boughton v. Standish*, 48 Vt. 594; *Hirshhorn v. Stewart*, 49 Iowa, 418; *Story on Sales*, § 404; *Bennett's Benjamin on Sales*, § 703; 2 *Parsons on Contracts*, 221; 2 *Schouler on Personal Property*, § 407, whence paragraph derived.

4 *Treadwell v. Reynolds*, 39 Conn. 31. Retention of wool not graded fleece by fleece: *Meherin v. Ball*, 8 Pac. Rep. (Cal.) 836.

5 *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187. But a usage of the Liverpool corn market, allowing the buyer but one day to object that corn sold was not equal to the sample, was held to be reasonable: *Sanders v. Jameson*, 2 Car. & K. 557; stated, *Bennett's Benjamin on Sales*, § 703.

6 See *Parker v. Palmer*, 4 Barn. & Ald. 387; *Chapman v. Morton*, 11 Mees. & W. 524; *Bennett's Benjamin on Sales*, §§ 703, 704; *Story on Sales*, § 405; 2 *Schouler on Personal Property*, § 407, whence paragraph derived; citing, also, *Delamater v. Chappell*, 43 Md. 244. A sale of part of the property by the buyer is an acceptance: *Hills v. McDonald*, 19 Wis. 97; as cited, 2 *Corbin's Benjamin on Sales*, § 1051, n. 5.

7 See *Bartholomae v. Paull*, 18 W. Va. 771; *Wellauer v. Fellows*, 48 Wis. 105.

8 2 *Schouler on Personal Property*, § 407.

9 *Chapman v. Morton*, 11 Mees. & W. 524; *Bennett's Benjamin on Sales*, § 703. See 2 *Schouler on Personal Property*, 407; stating and quoting, also, *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187.

§ 262. *Right of rejection.*—*For divergence from description.* The buyer may reject the goods as soon as

he has time and opportunity to examine them,<sup>1</sup> if they do not<sup>2</sup> answer the description.<sup>3</sup>

*Not after inspection and acceptance.* But after inspection and acceptance<sup>4</sup> the buyer cannot, in general, change his mind and reject.<sup>5</sup>

*Where to be exercised.* And where the contract was for cedar posts, to be delivered on board of vessels to be provided by the buyer, it was held that the posts must be accepted or rejected at the place of shipment, and that the buyer could not inspect and reject at the end of the voyage.<sup>6</sup>

1 Right of inspection : See § 260.

2 Divergence in quality, etc. : See § 260.

3 See *Boughton v. Standish*, 48 Vt. 594 ; *Knoblauch v. Kronschnabel*, 18 Minn. 300 ; *Simpson v. Krumdick*, 28 Minn. 352 ; *Doane v. Dunham*, 79 Ill. 131 ; 2 Corbin's Benjamin on Sales, § 1051, n. 5, citing these cases in support of text.

4 Acceptance in general : § 257.

5 See *Carondelet Iron Works v. Moore*, 78 Ill. 65, 69 ; 2 Corbin's Benjamin on Sales, § 1051, n. 5 ; § 977, n. 29 ; and § 966, n. 23.

6 *Brownlee v. Bolton*, 44 Mich. 218 ; as stated, 2 Corbin's Benjamin on Sales, § 1051, n. 5.

§ 263. *Buyer's course on rejection.—Getting rid of custody, etc.* The buyer should put his refusal of acceptance so plainly and so promptly before the seller, as to leave no doubt of his real intention in the premises, and get rid of the custody of the goods as soon as possible, unless he has concluded to keep them.<sup>1</sup> Thus, it has been laid down that where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample,<sup>2</sup> it is his duty to make a distinct offer to return, or in fact, to return the goods, by stating to the vendor that the goods are at his risk ; that they no longer belong to the purchaser ; that the purchaser rejects them ; that he throws them back on the vendor's hands ; and that the contract is rescinded.<sup>3</sup>

*When delay alone excusable.* And it is only where the buyer, by some artifice of the seller, or under other circumstances imputing to himself no negligence, is really deprived of his proper opportunity to examine,<sup>4</sup> that his right of acceptance, after the seller has tendered delivery, may long remain in abeyance.<sup>5</sup>

*Informal notice of non-acceptance.* But on the other hand, the buyer who means to refuse acceptance for cause is not narrowed to a technical performance of his duty.<sup>6</sup> Thus where the buyer met the seller on the day of delivery, and told him that the goods delivered were still on his premises, that they were bad, that he would not have them or pay for them, and that the seller might do what he liked with them, it was held that he had sufficiently performed his duty, and was not liable for the price.<sup>7</sup>

1 *Couston v. Chapman*, Law R. 2 H. L. S. 250 ; 3 Eng. Rep. 187 ; as cited in support of text in 2 *Schouler on Personal Property*, § 408. And compare *Story on Sales*, § 405.

2 Sales by sample : See under chapter on WARRANTY.

3 *Couston v. Chapman*, Law R. 2 H. L. S. 250 ; 3 Eng. Rep. 187.

4 See § 260, on RIGHT OF INSPECTION.

5 2 *Schouler on Personal Property*, § 408, referring to *Dutchess Co. v. Harding*, 49 N. Y. 321.

6 2 *Schouler on Personal Property*, § 408. For the real object of the law, with the fulfillment of which it is satisfied, is that the other party shall receive such formal and distinct notice of non-acceptance that he may secure his own interests, and perform seasonably what is incumbent upon him in return : 2 *Schouler on Personal Property*, § 408. Consult, also, *Story on Sales*, § 405.

7 *Grimoldby v. Wells*, Law R. 10 Com. P. 391 ; 12 Eng. Rep. 451 ; as stated, 2 *Schouler on Personal Property*, § 407, where note is made of the statement in this case that the buyer need not offer to send the goods back, nor place them in neutral custody, but comparison is suggested in this point, of *Couston v. Chapman*, Law R. 2 H. L. S. 250 ; 3 Eng. Rep. 187.

§ 264. *Seller's waiver of notice, etc.—Doctrine and illustration.* The seller may have waived strict notice of non-acceptance and return of the goods by entering into some special arrangement inconsistent with enforcing such requirements.<sup>1</sup> Thus where the buyer and the seller's agent agree that if the goods sent are not

satisfactory the buyer need not accept them, but shall retain them until the agent returns to the buyer's shop, the buyer is excused from giving an earlier notice of his refusal to accept.<sup>2</sup>

*Seller's agreement to alter article.* And where shutters are put up, to which the buyer objected and the seller agreed to alter them so as to correspond with the order, the seller must do as he promised before suing for payment.<sup>3</sup>

1 2 Schouler on Personal Property, § 409, whence next two paragraphs also derived. And consult 2 Corbin's Benjamin on Sales, § 1052, n. 6; citing, *Wartman v. Breed*, 117 Mass. 18.

2 *Suit v. Bonnell*, 23 Wis. 180. See *Kahn v. Klabunde*, 50 Wis. 235.

3 *Belt v. Stetson*, 26 Minn. 411; also noted, *Bennett's Benjamin on Sales*, § 704, n. q.

§ 265. **Buyer's waiver of objections.**—*By delay.* Waiver of objections turning receipt into acceptance may be inferred from delay to object.<sup>1</sup>

*Receipt after time limited.* And receipt after the time limited is a waiver of objections and damages, because of the delay to deliver.<sup>2</sup>

*To delivery of instalment.* Although acceptance without objection after inspection will preclude the buyer from rejecting the goods or avoiding the contract, yet acceptance of an instalment of inferior goods,<sup>3</sup> will not warrant the seller to continue to deliver inferior goods;<sup>4</sup> though if the buyer improperly refuses to accept a delivery of part, the seller is excused from tendering the whole.<sup>5</sup>

1 See *Reed v. Randall*, 29 N. Y. 358; 36 Am. Dec. 305; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Watkins v. Paine*, 57 Ga. 53; *Owens v. Sturges*, 67 Ill. 366; *Hadley v. Prather*, 64 Ind. 137; *Barton v. Kane*, 17 Wis. 37; 18 Wis. 262; *Paige v. McMillan*, 41 Wis. 337; *Kahn v. Klabunde*, 50 Wis. 235; *Gaff v. Hemeyer*, 59 Mo. 345; 2 Corbin's Benjamin on Sales, § 1051, n. 5, citing these cases in support of text.

2 *Baker v. Henderson*, 24 Wis. 509; *Bock v. Healey*, 8 Daly, 156; 2 Corbin's Benjamin on Sales, § 1051, n. 5; referring, also, to *Adams v. Helen*, 55 Mo. 493. So delivery after the time is a waiver of damages for refusal to receive within the time limited; *Gibbons v. United States*, 2 Ct. of Cl. 421.

3 See § 267, on DELIVERY BY INSTALMENTS.

4 See *Cahen v. Platt*, 69 N. Y. 348 ; 25 Am. Rep. 203 ; *Kipp v. Meyer*, 5 Hun, 111.

5 *Hughes v. United States*, 4 Ct. of Cl. 64. See 2 Corbin's *Benjamin on Sales*, § 1051, n. 5, whence paragraph derived.

§ 266. **Divergence in quality, etc.**—*Finality of acceptance.* Where the act of final acceptance is once completed under a contract of sale, the buyer is precluded from afterwards asserting that the goods were not of the quality or quantity agreed,<sup>1</sup> unless he can show<sup>2</sup> fraud,<sup>3</sup> or a warranty.<sup>4</sup>

*Goods of various qualities, etc.* And this rule holds true, even though the goods contracted for were to be of various qualities, and situated in various places ;<sup>5</sup> as where in a sale of lumber at so much for "prime," so much for "merchantable," and so much for "refuse," a buyer had receipted for a described quantity of each, after full opportunity to examine the entire lot.<sup>6</sup>

*Retaining defective goods, etc.* Where the contract is executory, it has been held that the assumed implication that the property is of a merchantable quality, is to be treated as a condition rather than a warranty, as to defects obvious upon inspection and discoverable when the contract was performed by the delivery of the property.<sup>7</sup> And the receiving and retaining of the property under the contract with knowledge of such defects, though under objection as to the defective quality of the property, has the effect of an acceptance of the property delivered, as a performance of the executory contract, and a waiver of the implied condition.<sup>8</sup>

*No waiver of objection.* But where one party entered into a written contract with another to sell and deliver to the latter within a specified time, ninety head of smooth and fat hogs, to weigh on an average two hundred and forty pounds each, and several days before the seller was to deliver the hogs he informed the buyer



that the hogs were too light and too rough to comply with the contract, but the buyer did not object to the hogs on those grounds, it was held that his failure to object at that time was not a waiver by him as to the fatness and smoothness of the hogs, if at the time the seller offered to deliver the hogs, the buyer objected to receiving them under the contract.<sup>9</sup>

1 2 Schouler on Personal Property, § 410.

2 See Story on Sales, § 406.

3 See generally chapter on FRAUDULENT SALES.

4 See generally chapter on WARRANTY.

5 See citations in next note.

6 See McCormick v. Sarson, 45 N. Y. 265; so cited in support of text, in 2 Schouler on Personal Property, § 410; referring, also, to Gilson v. Bingham, 43 Vt. 410.

7 Thompson v. Libby, 29 N. W. Rep. (Minn.) 150.

8 Thompson v. Libby, 29 N. W. Rep. (Minn.) 150; relying upon Haase v. Nonnemacher, 21 Minn. 486, and cases cited; Maxwell v. Lee, 27 N. W. Rep. 196; Gaylord Manuf. Co. v. Allen, 53 N. Y. 515; Locke v. Williamson, 40 Wis. 377; Olson v. Mayer, 56 Wis. 551.

9 Dowell v. Williams, 33 Kan. 319.

§ 267. *Where delivery by instalments.—When rejection not barred.* Where delivery is made by instalments, the buyer's acts of acceptance should naturally correspond;<sup>1</sup> so that the buyer's acceptance of the first instalment will not debar him from rejecting, on proper grounds, the portions subsequently delivered.<sup>2</sup>

*New terms of acceptance.* But of course a buyer may acquiesce in modifications of the original contract of delivery, so as to be bound to new terms of acceptance, as frequently happens under instalment contracts.<sup>3</sup>

*Return of parcels first received.* As a buyer may refuse to take less than the quantity delivered,<sup>4</sup> so he may return the parcels first received, where a whole quantity was ordered to be delivered from time to time, and the latter deliveries are not duly made.<sup>5</sup>

1 See citations in next note.

2 See Hubbard v. George, 49 Ill. 275; as cited in support of text, in 2 Schouler on Personal Property, § 410. Like effect: 2 Corbin's

Benjamin on Sales, § 1051, n. 5; citing, *Cahen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203; *Kipp v. Meyer*, 5 Hun, 111; *Hughes v. United States*, 1 Ct. of Cl. 64.

3 See *Haines v. Tucker*, 50 N. H. 307; *Avery v. Willson*, 81 N. Y. 341; 37 Am. Rep. 503; 2 Schouler on Personal Property, §§ 390, 410, making these citations in support of text.

4 Consult § 235, on QUANTITY DELIVERED.

5 See *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Bowes v. Shand*, Law R. 2 App. C. 455; *Reuter v. Sala*, Law R. 4 C. P. D. 239; 30 Eng. Rep. 518, *Marland v. Stanwood*, 101 Mass. 470; 1 Schouler on Personal Property, § 390; 2 Schouler on Personal Property, § 410; referring, also, in support of text, to *Honck v. Muller*, 45 L. T. 202; S. C. Law R. 7 Q. B. D. 92; 36 Eng. Rep. 264. But where delivery is tendered for the purpose of fulfilling the seller's contract in part, the buyer cannot take and hold the goods tendered for any other purpose: *Burrill v. Sampson*, 73 Me. 286.

§ 268. **Article to be satisfactory, etc.**—*Good faith of rejection.* If the rejection of coal condemned as unsatisfactory by a railroad company's masters of machinery and transportation, to whom it was to be satisfactory in quality, is not made in good faith, and in the exercise of an honest judgment, it will not be a sufficient justification to the railroad company for refusing to continue to receive the coal.<sup>1</sup>

*Rejection after trial.* Where the contract by which a village agrees to purchase a steam fire-engine and attachments provides for the payment of the first instalment of the purchase money at the date of acceptance of the property, and at the request of the vendee, the vendor sends one of its employees to assist at the trial of the engine, the nature of the machinery making a trial necessary to determine its fitness for the purposes required, it was held that the acceptance was to be after trial, not when placed upon the cars at the place of manufacture;<sup>2</sup> and that upon a rejection of the engine, the vendor could not recover in assumpsit for the purchase money.<sup>3</sup>

1 *Baltimore & O. R. Co. v. Brydon*, 3 Atl. Rep. (Md.) 306; following, *Lynn v. Baltimore & O. R. Co.* 60 Md. 404.

2 *Mansfield Machine Works v. Village of Lowell*, 29 N. W. Rep. (Mich.) 105; referring to *Cole v. Homer*, 53 Mich. 438; 19 N. W. Rep. 135.

3 *Mansfield Machine Works v. Village of Lowell*, 29 N. W. Rep. (Mich.) 105. Though he might have a remedy in an action for breach of contract and refusal to accept: *Mansfield Machine Works v. Lowell*, 29 N. W. Rep. 105.

## CHAPTER XIX.

## PAYMENT.

- § 269. Payment in general.
- § 270. Payment in cash.
- § 271. Payment in negotiable paper.
- § 272. Credit sales.
- § 273. Mode of making.

§ 269. **Payment in general.**—*Signification.* Payment in its most general sense covers the accomplishment of every obligation, but in a more restricted sense, payment is the discharge in money of a sum due.<sup>1</sup>

*Buyer's duty.* And the last duty of the buyer, which is quite commonly the final act of performance of the contract of sale,<sup>2</sup> is to pay for the goods bought<sup>3</sup> in conformity with the terms of the bargain.<sup>4</sup>

*Modes of payment.* Payment of the price may be arranged for in three ways: in cash, in negotiable securities, or on credit.<sup>5</sup> And the mode of payment in any case will depend upon the agreement, express or implied, of the parties,<sup>6</sup> neither of whom can claim the sole right to vary it, though optional modes of payment are sometimes agreed upon.<sup>7</sup>

1 2 Bouvier Law Dict. tit. Payment (15th ed.), 392, fully discussing scope of term. And consult cases collected in Winfield's Words etc. 454, 455; 2 Abbott's Law Dict. 258. Payment of less sum than due: Jones v. Perkins, 29 Miss. 139; 64 Am. Dec. 136, n. 138.

2 See Fitzpatrick v. Fain, 3 Cold. 15, 19.

3 See Martineau v. Kitching, Law R. 7 Q. B. 436, 449; 2 Eng. Rep. 539, 552.

4 2 Schouler on Personal Property, § 411. Where goods destroyed: Castle v. Playford, Law R. 7 Ex. 98, 100; 1 Eng. Rep. 204, 207. Time of payment: See Terwilliger v. Murphy, 104 Ind. 32; Schenectady Stove Co. v. Holbrook, 4 N. E. Rep. 4; 2 Schouler on Personal Property, § 415; stating, Brandon Manuf. Co. v. Morse, 48 Vt. 322; Lowry v. Barelli, 21 Ohio St. 324; Beauchamp v. Archer, 58 Cal. 431; 41 Am. Rep. 266. Payment in general discussed: 2 Bouvier Law Dict. (14th ed.) 311; 2 Greenl. Ev. (14th ed.) §§ 516, 536.

5 See succeeding sections of chapter on these various modes of payment.

6 See *Brady v. Wasson*, 6 Heisk. 135; as noted, *Winfield's Words* etc. 455.

7 2 Schouler on Personal Property, § 411. Compound or optional payment in part cash and part credit or notes; 2 Schouler on Personal Property, § 421; citing, *Rugg v. Weir*, 16 Com. B. N. S. 471; *Gray v. White*, 108 Mass. 228. Option to pay in specific chattels: *Cummings v. Dudley*, 60 Cal. 383; 44 Am. Rep. 58.

§ 270. **Payment in cash.**—*In general.* Cash payment means the opposite of credit;<sup>1</sup> and a sale for cash means that the money is paid when the property is delivered.<sup>2</sup>

*Where contract silent.* Where nothing is said at the time of purchase of goods about payment, the law presumes that the sale is for cash,<sup>3</sup> and payment and delivery are immediate and concurrent acts.<sup>4</sup>

*Demand of price.* And in such cases it is said that the buyer ought not to wait until a demand is made upon him for the price, but to offer that payment without which he can have no right to remove the goods.<sup>5</sup>

1 *Foley v. Mason*, 6 Md. 37; as noted, 1 Abbott's Law Dict. 189; referring, also, to *Steward v. Scudder*, 24 N. J. L. 96. Scope of term "cash": 1 Bouvier Law Dict. (15th ed.) 288.

2 *Bliss v. Arnold*, 8 Vt. 255; as noted, *Winfield's Words* etc. 549. And see *Turner v. Moore*, 58 Vt. 455, 456; 3 Atl. Rep. 467.

3 See *Robbins v. Harrison*, 31 Ala. 160, 169.

4 *Southwestern Freight etc. Co. v. Plant*, 45 Mo. 517, 519. And see *Davis v. Adams*, 18 Ala. 264, 267. Consult, also, *Coil v. Willis*, 13 Ohio, 23, 31; *Goldsmith v. Bryant*, 26 Wis. 34, 38; *Clark v. Dales*, 20 Barb. 42, 61.

5 2 Schouler on Personal Property, § 412. But compare *contra*, *Warren v. Wheeler*, 8 Met. 97, 99.

§ 271. **Payment in negotiable paper.**—*By check.* Payment by check is looked upon as a species of cash payment,<sup>1</sup> but the dishonor of the check<sup>2</sup> is a breach of the condition on which it is supposed to be taken.<sup>3</sup>

*By buyer's note, etc.* Where payment for goods thereupon delivered is made in the buyer's promissory note, or by his acceptance of a bill of exchange, it is the doctrine in England,<sup>4</sup> and in many of the States of the Union, that there is, at least *prima facie*,<sup>6</sup> no absolute

discharge of the debt,<sup>6</sup> but a postponement of payment only,<sup>7</sup> or conditional payment, subject to revival of the seller's right of action on non-payment at maturity.<sup>8</sup> But in some of the States such payment is *prima facie* absolute,<sup>9</sup> and the intention of the parties governs any presumption either way.<sup>10</sup>

*Third party's note, etc.* Where at the time of the sale and delivery of goods, the vendor receives from the vendee a note or similar obligation of a third person for the price, the presumption is that he takes it in payment,<sup>11</sup> and it will usually be regarded as taken in payment, either by way of cash or of barter,<sup>12</sup> unless a different intent appears.<sup>13</sup>

1 Checks in general: 1 Bouvler Law Dict. (14th ed.) 261.

2 See 2 Greenl. Ev. § 520; 2 Bouvler Law Dict. (14th ed.) 311; citing, 2 Parsons on Contract, 136.

3 See Hodgson v. Barrett, 33 Ohio St. 63; 31 Am. Rep. 527, discussing payment by check; 2 Schouler on Personal Property, § 418; Bennett's Benjamin on Sales, 731; and 2 Corbin's Benjamin on Sales, § 1083, n. 19, and cases cited. Check of third person: Fleig v. Sleet, 43 Ohio St. 51; 54 Am. Rep. 800.

4 It is there said that when one speaks of paying in cash, that means in satisfaction; but when by bill, that does not import satisfaction, unless the bill is ultimately taken up: Maillard v. Duke of Argyle, 6 Man. & G. 45; as quoted, Winfield's Words etc. 455.

5 See Crabtree v. Segrist, 6 Pacif. Rep. (N. M.) 202, 205.

6 Promissory note not payment of debt unless so agreed: Blunt v. Walker, 11 Wis. 334; 78 Am. Dec. 709, n. 718.

7 See citations in next note.

8 See Heinbockle v. Zugbaum, 5 Mont. 344; 51 Am. Rep. 59, 61; 2 Schouler on Personal Property, § 419; Bennett's Benjamin on Sales, §§ 729, 730; 2 Corbin's Benjamin on Sales, §§ 1081, 1082; Story on Sales, § 219; 2 Chitty on Contracts (11th Am. ed.), 1135, notes.

9 See Crabtree v. Segrist, 6 Pac. Rep. (N. M.) 202, 205; citing prior different doctrine in Thacher v. Dinsmore, 5 Mass. 299; Whitcomb v. Williams, 4 Pick. 228; Butts v. Dean, 2 Met. 76. And consult 2 Schouler on Personal Property, § 419; Story on Sales, § 219; Re Clap, 2 Low. 226, 230.

10 See 2 Schouler on Personal Property, § 419; 2 Corbin's Benjamin on Sales, § 1081, n. 17.

11 See Noel v. Murray, 13 N. Y. 167; Youngs v. Stahelin, 34 N. Y. 253, 265.

12 See Read v. Hutchinson, 3 Camp. 352; Camidge v. Allenby, 6 Barn. & C. 373; Guardians of Litchfield v. Green, 1 Hurl. & N. 884.

13 See Allen v. Buntel, 2 Thomp. & C. 342. Consult for sources of paragraph, Bennett's Benjamin on Sales, § 739; 2 Corbin's Benjamin on Sales, § 1081, n. 17; 2 Schouler on Personal Property, § 420.

§ 272. *Credit sales.—In general.* Credit is said to be the time allowed by the creditor for the payment of goods sold by him to the debtor.<sup>1</sup> And there is said to be a sale on credit when property is sold without any expectation of immediate payment, irrespective of the length of time for which the payment is deferred.<sup>2</sup>

*Effect of.* If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and right of property vest at once in him,<sup>3</sup> though his right of possession is not absolute, but is liable to be defeated if he becomes insolvent before he obtains possession.<sup>4</sup>

*Time of payment under.* The buyer is not obliged to pay before the expiration of the term of credit, nor is he previously subject to suit upon his note given to the seller in postponement of payment.<sup>5</sup> But where no time of credit definitely fixed by express agreement or custom can clearly be shown, payment is due on the seller's demand, and the seller should put the buyer in default by sending his bill or other notification that he desires settlement for the goods.<sup>6</sup>

1 1 Bouvler Law Dict. (15th ed.) 454.

2 Anstedt v. Sutter, 30 Ill. 164, 166. Authority of agent to sell on credit: See 1 Chitty on Contracts (11th Am. ed.), 295, n. y; Bennett's Benjamin on Sales, § 743, n. c; citing, also, Dresden School Dist. v. Ætna Ins. Co. 62 Me. 370, and cases cited; Riley v. Wheeler, 44 Vt. 189; Daylight Burner Co. v. Odlin, 51 N. H. 56, 59, 60; Parsons v. Martin, 11 Gray, 115; Bowman v. Brown, 3 Q. B. 511. Term, proof, etc., of credit: 2 Schouler on Personal Property, § 422.

3 Bloxam v. Sanders, 4 Barn. & C. 941; Ross' Leading Cases, 4.

4 Bloxam v. Sanders, 4 Barn. & C. 941; Ross' Leading Cases, 4; citing, Tooke v. Hollingsworth, 5 Term Rep. 215. And see 2 Kent Com. 493; Leonard v. Davis, 1 Black, 476, 483; § 159, on RIGHT OF POSSESSION.

5 See Story on Sales, § 422; 2 Schouler on Personal Property, § 422; citing, also, Stedman v. Gooch, 1 Esp. 5; Rugg v. Weir, 16 Com. B. N. S. 471; Rice v. Andrews, 32 Vt. 691. Consult further Bennett's Benjamin on Sales, § 765; 1 Chitty on Contracts (11th Am. ed.), 615, n. r, and cases cited. Failure to furnish negotiable security as agreed: See last two of cases above cited. Effect of buyer's notice

of inability to pay before expirations of credit : *Keller v. Strasburger*, 90 N. Y. 379.

6 2 Schouler on Personal Property, § 422, referring to *Hodgson v. Davies*, 2 Camp. 530.

§ 273. **Mode of making.**—*In general.* In regard to the mode of making payment, it may be by any lawful method agreed upon between the parties, and fully executed.<sup>1</sup>

*Not in cash.* And the buyer's common obligation to pay cash is capable of being varied by circumstances, according to the different phases of intent in a contract.<sup>2</sup> Thus there may be payment by assumption of certain debts of the seller,<sup>3</sup> by set-off on an account stated,<sup>4</sup> or in chattels at the option of the buyer.<sup>5</sup>

*Tender, etc.* Not only will payment relieve the buyer from liability under the contract, but a tender of what is due may be sufficient;<sup>6</sup> and in regard to payment and tender under a sale, constant application is made of the ordinary rules regulating relations between debtor and creditor.<sup>7</sup>

1 2 Greenl. Ev. § 519. Payment through agents : 2 Schouler on Personal Property, §§ 423-425. Transmission of payment : *Bennett's Benjamin on Sales*, § 710 ; 2 Corbin's Benjamin on Sales, § 1095, n. 5 ; 2 Schouler on Personal Property, § 416. And consult following cases cited by these writers : *Warwick v. Noakes*, Peake, 68, 98 ; *Wakefield v. Lithgow*, 3 Mass. 249 ; *Crane v. Pratt*, 12 Gray, 348, 349 ; *Gurney v. Howe*, 9 Gray, 404, 408 ; *First Nat. Bank v. McMonigle*, 69 Pa. St. 156 ; *Morgan v. Richardson*, 13 Allen, 410 ; *Williams v. Carpenter*, 36 Ala. 9 ; *Gordon v. Strange*, 1 Ex. 477 ; *Caine v. Coulson*, 1 Hurl. & C. 764 ; *Holland v. Tyns*, 56 Ga. 56 ; *Hawkins v. Rutt*, Peake, 186, 248 ; also, 2 Greenl. Ev. § 525 ; 2 Bouvier Law Dict. (14th ed.) 311, 313.

2 2 Schouler on Personal Property, § 416.

3 See *Soustiby v. Keeley*, 11 Fed. Rep. 578.

4 See *Livingstone v. Whiting*, 15 Q. B. 722 ; 19 Law J. Q. B. 528.

5 See *Cummings v. Dudley*, 60 Cal. 383 ; 44 Am. Rep. 58. Consult further, *Bennett's Benjamin on Sales*, § 1062 ; 2 Corbin's Benjamin on Sales, § 1062, n. 6, and 1063, n. 7 ; 2 Schouler on Personal Property, § 416.

6 Tender fully discussed : 2 Bouvier Law Dict. (14th ed.) 581 ; 2 Greenl. Ev. 600-611.

7 2 Schouler on Personal Property, § 416. Appropriation of payments : 2 Greenl. Ev. §§ 529-536 ; *Bennett's Benjamin on Sales*, §§ 746-750, notes ; 2 Corbin's Benjamin on Sales, §§ 1104-1109, notes.

## CHAPTER XX.

### STATUTE OF FRAUDS.

- § 274. In general.
- § 275. Contracts covered.
- § 276. Things attached to the soil.
- § 277. Incorporeal personalty.
- § 278. Prescribed amount.
- § 279. Earnest or part payment.
- § 280. Delivery.
- § 281. Acceptance and receipt.
- § 282. Acceptance.
- § 283. What constitutes acceptance.
- § 284. Actual receipt.
- § 285. Intervention of carriers.
- § 286. Memorandum in general.
- § 287. Form of memorandum.
- § 288. Contents of memorandum.
- § 289. Parol evidence concerning memorandum.
- § 290. Modification of original bargain.
- § 291. Signature to memorandum.
- § 292. Compliance by agents.
- § 293. Broker's memorandum.

§ 274. In general. — *Changes common law.* Although at common law consent alone was sufficient to constitute a valid sale, yet the statute of frauds has now intervened, and other formalities are prescribed to make the transfer valid.<sup>1</sup>

*Purpose.* The purpose of this celebrated enactment, as declared in the preamble, and gathered from its provisions, was to prevent fraud and falsehood, by requiring a party who seeks to enforce an oral contract in court to produce, as additional evidence, some written memorandum signed by the party to be charged,<sup>2</sup> or proof of some act confirmatory of the contract relied on.<sup>3</sup>



*Provisions respecting personal property.* The seventeenth section of the statute, relating especially to sales of personal property, provides, as originally enacted, that no contract for the sale of goods, wares, or merchandises of the price of ten pounds or upwards, shall be allowed to be good,<sup>4</sup> except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or by their agents thereunto lawfully authorized.<sup>5</sup>

*Prevalence.* This famous statute is not only in force throughout the British Empire, but forms the basis of like legislation in many of the States of the American Union.<sup>6</sup>

*Design and operation.* According to one view of the design of the statute of frauds, sometimes embodied in legislative phraseology, an oral contract, unaided by any of the formalities mentioned in the seventeenth section as equivalent to writing, is totally and entirely void.<sup>7</sup> But a different view in vogue in England, which has been deemed the more correct position, is that the contract still exists, but that it cannot be put in force, or in other words, that it is valid but unenforcible.<sup>8</sup> And in this country it has been considered that the statute does not prohibit an oral contract, or declare that it shall be void or illegal, unless certain formalities are observed;<sup>9</sup> but that it concerns the remedy only as between the parties, and affects the modes of proof as to all contracts within the statute, and not the validity of the contract itself.<sup>10</sup>

*Subsequent compliance.* So it seems to be the better opinion that a contract of sale, where there is no contemporaneous writing, may be rendered enforceable by

subsequent acts of compliance with the statute, regarded as relating back to the date of the oral agreement.<sup>11</sup>

*When provision inapplicable.* A provision of the statute of frauds declaring contracts involving a specified sum or more to be void in certain cases, has been held to have reference to the sale of goods, the price of which amounts to such sum or more, and to be inapplicable where no sale of property was involved in the contract in controversy.<sup>12</sup>

1 Cunningham v. Ashbrook, 20 Mo. 553, 558. And see De Foncleare v. Shottenkirk, 3 Johns. 170, 174; Fancher v. Goodman, 29 Barb. 315, 318.

2 See later sections of chapter on MEMORANDUM.

3 Townsend v. Hargraves, 118 Mass. 325, 334. And see Williams v. Robinson, 73 Me. 186; Cusack v. Robinson, 1 Best & Smith, 299; Langdell's Cases on Sales, 266, 272. Origin of enactment: See Ash v. Abdy, 3 Swanst. 664, Appx.; Wain v. Warlters, 5 East, 17; Wyndham v. Chetwynd, 1 Burr. 418; Story on Sales, § 256; 18 Am. Law Rev. 442.

4 Other expressions in the enactments of some of the States: See Browne on Statute of Frauds (4th ed.), Appx.; Brown v. Allen, 35 Iowa, 306; 2 Kent Com. 494, n. a.

5 See Stat. 29, Charles II. ch. 3, § 17 (1677); amended by substitution of "value" for "price," etc., by Lord Tenterden's Act, 9 George IV., ch. 14. Consult 2 Kent Com. 494; Stims, Am. Stat. Law, p. 462, § 441; 1 Reed on Statute of Frauds, §§ 218, 219; Wood on Frauds, § 232; 1 Greenl. Ev. (14th ed.) § 267; 3 Parsons on Contracts, 5.

6 See Browne on Statute of Frauds (4th ed.), Appx.; 1 Bouvier Law Dict. tit. Frauds, Statute of (14th ed.), 614; 1 Greenl. Ev. (14th ed.) § 262; 4 Kent Com. (4th ed.) 96, n. b. In some of the States there are mere verbal variations from the English enactment, and changes in the amount prescribed; in others the statute is thrown into a new form; and in still others there is no special legislation on the subject: See 2 Schouler on Personal Property, § 429, p. 430, n. And consult Stims, Am. Stat. Law, pp. 459, 464, §§ 4140, 4149; 1 Reed on Statute of Frauds, 218, 221; Wood on Frauds, § 232.

7 See 1 Smith on Contracts, 177; McLean v. Nicoll, 7 Jur. N. S. 999; Langdell's Cases on Sales, 487, 489; Marsh v. Hyde, 3 Gray, 331; Langdell's Cases on Sales, 313. But compare *contra*, Hawley v. Keeler, 53 N. Y. 114; Brown v. Allen, 35 Iowa, 306.

8 See McLean v. Nicoll, 7 Jur. N. S. 999; Langdell's Cases on Sales, 487, 489; Bailey v. Sweeting, 9 Com. B. N. S. 843, 859; 30 Law J. Com. P. 150; Langdell's Cases on Sales, 480, 485; 9 Am. Law Rev. 434. Compare, however, Noble v. Ward, Law R. 1 Ex. 117; Langdell's Cases on Sales, 520, 523.

9 Townsend v. Hargraves, 118 Mass. 325, 334.

10 See Townsend v. Hargraves, 118 Mass. 325, 334; Norton v. Simonds, 124 Mass. 19, 21; Amsmick v. Am. Ins. Co. 129 Mass. 185; Williams v. Robinson, 73 Me. 186; Browne on Statute of Frauds, § 115, n. Conflict of laws: See Leroux v. Brown, 12 Com. B. 801. Price note unenforceable where contract does not comply with statute: Hooker v. Knab, 26 Wis. 511. Basis of most of foregoing matter: 2 Schouler

on Personal Property, §§ 423-435; Bennett's Benjamin on Sales, §§ 90, 91, and notes; 1 Corbin's Benjamin on Sales, § 91, n. 2; citing upon American view of effect of statute, Smith v. Smith, 14 Vt. 440; Green v. N. C. R. R. Co. 77 N. C. 95; Davis v. Inscoe, 84 N. C. 396; Chicago Dock Co. v. Kenzie, 49 Ill. 259; and Rickard v. Cunningham, 10 Neb. 417. Consult, also, 2 Kent Com. p. 724, n. 1.

11 See Bailey v. Sweeting, 9 Com. B. N. S. 843; Langdell's Cases on Sales, 480; Leather Cloth Co. v. Hieronimus, Law R. 10 Q. B. 140; 12 Eng. Rep. 211; Townsend v. Hargraves, 118 Mass. 325. But compare *contra*, Bill v. Bament, 9 Mees. & W. 36; Langdell's Cases on Sales, 161. Basis of paragraph: 2 Schouler on Personal Property, § 433. And consult Langdell's Cases on Sales, 1035.

12 Hinkle v. Fisher, 104 Ind. 84.

§ 275. *Contracts covered.*—*Executory sales.* In England, prior to Lord Tenterden's Act, which assumed to expressly cover such cases, there was one line of decisions drawing a distinction between executory and executed contracts, and followed in various American rulings, which confined the application of the seventeenth section of the statute of frauds to contracts for the sale of goods to be immediately delivered, and excluded agreements where the goods were designed to be delivered at some future time, but were not yet existing or fit for delivery.<sup>1</sup> And it appears to be the New York doctrine that an agreement for the sale and delivery, now or hereafter, of articles already existing, is within the statute, but not an agreement to sell and deliver articles which have no existence, and are to be made hereafter.<sup>2</sup> But the modern English doctrine followed in some of the States, seems to consider the question to be whether the contract was one for the sale of goods or for work and labor, and to hold that if the contract be such that when carried out it would result in the sale of a chattel, then the party cannot sue for work and labor, but that if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, then the party cannot sue for goods sold and delivered.<sup>3</sup> And in Massachusetts, the distinction is drawn that a con-

tract for the sale of articles already existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies, but that the case is not within the statute if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market.<sup>4</sup>

*Auction sales.* Auction sales, as well as execution sales and public sales generally, are now settled to be within the policy of the statute of frauds, independent of their inclusion by special phraseology.<sup>5</sup>

*Various contracts.* A chattel mortgage is sometimes deemed to come within the denomination of contracts of sale, as being a species of conditional or defeasible sale;<sup>6</sup> but not an agreement to be partners in a sale of goods;<sup>7</sup> nor an oral agreement which involves a loan upon security and not a sale.<sup>8</sup>

*Mixed contracts.* Where a contract includes a sale of goods, and other matters not within the statute, the seventeenth section of the statute will apply if the goods included in the contract be of the prescribed value, though the rest of the contract may perhaps be enforced, if there can be separation of the valid and invalid portions.<sup>9</sup>

1 See *Towers v. Osborne*, 1 Strange, 506; *Langdell's Cases on Sales*, 1; *Clayton v. Andrews*, 4 Burr. 2101; *Langdell's Cases on Sales*, 2; *Groves v. Buck*, 3 Maule & S. 178; *Langdell's Cases on Sales*, 9; *Eichelberger v. McCauley*, 5 Har. & J. 213; *Langdell's Cases on Sales*, 39. But see *Rondeau v. Wyatt*, 2 Black. II. 63; *Langdell's Cases on Sales*, 3; *Cooper v. Elston*, 7 Term Rep. 14; *Langdell's Cases on Sales*, 6; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Langdell's Cases on Sales*, 10.

2 See *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619; *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517; *Higgins v. Murray*, 73 N. Y. 452; *Bennett v. Hull*, 10 Johns. 364; *Langdell's Cases on Sales*, 31; *Crookshank v. Burrell*, 13 Johns. 58; 9 Am. Dec. 187; *Langdell's Cases on Sales*, 321; *Sewall v. Fitch*, 8 Cowen. 215; *Langdell's Cases on Sales*, 33; *Flint v. Corbitt*, 6 Daly, 429. But it may be assumed that the old exemption from the statute of contracts to deliver thereafter a commodity already in existence, has no present footing in the United States: See *Cason v. Cheely*, 6 Ga. 554; *Hooker v. Knab*, 26 Wis. 511.

3 *Lee v. Griffin*, 1 Best & Smith, 272; *Langdell's Cases on Sales*, 20. And see *Grafton v. Armitage*, 2 Com. B. 356; *Langdell's Cases on Sales*, 11; distinguishing, *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801. Compare *Clay v. Yates*, 1 Hurl. & N. 73; *Langdell's Cases on Sales*, 15. Consult, also, *Pitkin v. Noyes*, 48 N. H. 294; 2 Am. Rep. 218. And see *Finney v. Apgar*, 2 Vroom, 266; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55.

4 *Goddard v. Binney*, 115 Mass. 430; 15 Am. Rep. 112. And see *Mixer v. Howarth*, 21 Pick. 205; 32 Am. Dec. 256; *Langdell's Cases on Sales*, 25; *Spencer v. Cone*, 1 Met. 283; *Langdell's Cases on Sales*, 28; *Gardner v. Joy*, 9 Met. 177; *Langdell's Cases on Sales*, 29; *Lamb v. Crafts*, 12 Met. 353; *Waterman v. Meigs*, 4 Cush. 497; *Clark v. Nichols*, 107 Mass. 547; *May v. Ward*, 134 Mass. 127. Similar doctrine in Maine: See *Hight v. Ripley*, 19 Me. 139; *Edwards v. Grand Trunk R. R. Co.* 48 Me. 379; 54 Me. 105; *Crockett v. Scribner*, 64 Me. 447. And in Wisconsin: *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722. Basis of foregoing matter: 2 *Schouler on Personal Property*, §§ 438-443; *Langdell's Cases on Sales*, 1025, 1039; *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619, 621-623. And consult *Bennett's Benjamin on Sales*, §§ 92-109, notes; 1 *Corbin's Benjamin on Sales*, §§ 92-110, notes; *Campbell on Sales*, 162, 164; *Story on Sales*, §§ 260-260 c, notes; *Hillard on Sales*, pp. 464-467; *Browne on Statute of Frauds*, §§ 299-308; *Wood on Frauds*, §§ 295-304; 2 *Kent Com.* (13th ed.) p. 724, n. 2; *Puget Sound Iron Co. v. Worthington*, 7 Pac. Rep. (Wash. T.) 886; *Pawleski v. Hargreaves*, 47 N. J. L. 334; 54 Am. Rep. 162, with reporter's notes, 164, reviewing cases on subject.

5 See 2 *Schouler on Personal Property*, § 444; citing, 2 *Kent Com.* 540; *Browne on Statute of Frauds*, § 293; *Story on Sales*, § 264; *Hinde v. Whitehouse*, 7 East, 558; *Langdell's Cases on Sales*, 102, 108, 110 (questioning, *Simon v. Motivos*, 1 Black. W. 599); *Kenworthy v. Schofield*, 2 Barn. & C. 945; *Langdell's Cases on Sales*, 373; *Morton v. Dean*, 13 Met. 385; *Brent v. Green*, 6 Leigh, 16; *O'Donnell v. Leeman*, 43 Me. 158. Like effect: *Davis v. Rowell*, 13 Am. Dec. 398; *Meadows v. Meadows*, 15 Am. Dec. 645.

6 See *Gleason v. Drew*, 9 Greenl. 79; *Clark v. Duffey*, 24 Ind. 271; *Browne on Statute of Frauds*, § 294. Sale and defeasible sale: *Wood on Frauds*, §§ 285, 286.

7 *Bucker v. Ries*, 34 Mo. 354.

8 *Brown v. Allen*, 35 Iowa, 306. Basis of paragraph: 2 *Schouler on Personal Property*, § 445. Conversation importing a contract of sale which must comply with statute: See *Bates v. Coster*, 3 Thomp. & C. 580; *Bowers v. Anderson*, 49 Ga. 143. Promise to pay for goods of another, etc.: See *Bugbee v. Kendricken*, 130 Mass. 437; *Flanagan v. Hutchinson*, 47 Mo. 237. Contract not to be performed within a year: See *Equitable Gas Light Co. v. Baltimore Coal Tar etc. Co.* 63 Md. 285; *Gregory v. Underhill*, 6 Lea, 207. Consult as to patents, also, *Blakeney v. Goode*, 30 Ohio St. 350; *Somerby v. Buntin*, 118 Mass. 279. But compare *Packet Co. v. Stiles*, 5 Wall. 580.

9 See *Harman v. Reeve*, 18 Com. B. 586; *Langdell's Cases on Sales*, 90; *Irvine v. Stone*, 6 Cush. 508; *Rand v. Mather*, 11 Cush. 1, 7; 59 Am. Dec. 131; *Bennett's Benjamin on Sales*, § 137, and cases cited; 1 *Corbin's Benjamin on Sales*, § 137, n. 4. Entirety of contract discussed: 2 *Schouler on Personal Property*, § 446.

§ 276. Things attached to the soil.—*Products of the earth.* It is now the settled rule of England and Amer-

ica, at least in the absence of manifestations of a different intent, that *fructus industriales*, or annual crops which are the fruits of periodical industry, such as unsevered corn, potatoes, etc., do not come within the provisions of section four of the statute of frauds relating to interests in land,<sup>1</sup> but that they are chattels which presumably fall within the provisions of the seventeenth section of the statute.<sup>2</sup> But the English decisions seem to justify the position that an oral contract relating to *fructus naturales* or natural products of the soil, such as timber, fruit trees, grass, etc., which contemplates the transfer of the seller's property while they are still annexed to the soil, is within the fourth section of the statute of frauds as an interest in land,<sup>3</sup> while the oral sale of such products in the ground, but awaiting a severance before property can pass to the purchaser, is only a chattel sale.<sup>4</sup>

*Growing trees.* In New York and several other States, it is, however, emphatically laid down that the sale of growing trees, with the right given to the purchaser to enter and remove them hereafter, must invariably be expressed in writing, as constituting the sale of an interest in lands within the statute.<sup>5</sup> But there are said to be numerous opinions among the later cases in this country which justify the inference in regard to all contracts for the sale of trees or timber, that irrespective of the circumstance that the purchaser shall cut the trees instead of the vendor, such contracts concern an interest in lands, and must be put in writing if the parties meant to grant a present property to the unsevered trees;<sup>6</sup> but that it is otherwise if the obvious design of the parties was to sell trees, the title to which should not pass to the purchaser until the thing had been severed so as to exist as a chattel.<sup>7</sup>

*Fixtures.* It has been held in England that an agreement for the sale of fixtures between the landlord and

the outgoing tenant is not a sale of goods, either within the statute of frauds or the meaning of a count for goods sold and delivered;<sup>8</sup> and it seems that a contract which purports not merely to sell, but to annex the thing so that it shall be permanently incorporated with the soil, cannot be regarded as a mere contract for the sale of goods within the seventeenth section of the statute.<sup>9</sup>

1 See *Green v. Armstrong*, 1 Denio, 550; *Kingsley v. Holbrook*, 45 N. H. 313; *Bryant v. Crosby*, 40 Me. 22; *Ross v. Welch*, 11 Gray, 235; *Purner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591; *Moreland v. Myall*, 14 Bush, 474; *Story on Sales*, § 263 *a*; *Bennett's Benjamin* and 1 *Corbin's Benjamin on Sales*, §§ 120-122; *Evans v. Roberts*, 5 Barn. & C. 829; *Langdell's Cases on Sales*, 46; *Jones v. Flint*, 10 Ad. & E. 753; *Langdell's Cases on Sales*, 66; *Dunne v. Ferguson*, Hayes, 540; *Langdell's Cases on Sales*, 73. Compare *Mayfield v. Wadsley*, 3 Barn. & C. 366; *Earl of Falmouth v. Thomas*, 1 Crompt. & M. 89. English cases relating to unsevered crops in general; *Warwick v. Bruce*, 2 Maule & S. 205; *Langdell's Cases on Sales*, 45; *Parker v. Staniland*, 11 East, 367; *Langdell's Cases on Sales*, 42; *Crosby v. Wadsworth*, 6 East, 602; *Watts v. Friend*, 10 Barn. & C. 443; *Langdell's Cases on Sales*, 63; *Sainsbury v. Matthews*, 4 Mees. & W. 343; *Langdell's Cases on Sales*, 64. And consult *Campbell on Sales*, 158-162; *Langdell's Cases on Sales*, 1034.

2 See *Blackburn on Sales*, pp. 19, 20. And consult for basis of foregoing matter, 2 *Schouler on Personal Property*, §§ 448-450.

3 See citations in next note.

4 See *Washburn v. Burrows*, 1 Ex. 107; *Rodwell v. Phillips*, 9 Mees. & W. 501; *Blackburn on Sales*, 9, 10; *Bennett's Benjamin* and 1 *Corbin's Benjamin on Sales*, §§ 122-126; *Marshall v. Green*, Law R. 1 C. P. D. 35; 15 Eng. Rep. 218. And compare *Smith v. Lunnau*, 9 Barn. 561; *Graves v. Weld*, 5 Barn. & Adol. 105; *Purner v. Piercy*, 40 Md. 212, 223; 17 Am. Rep. 591.

5 See *Green v. Armstrong*, 1 Denio, 550; *Howe v. Batchelder*, 49 N. H. 204; *Huff v. McCauley*, 53 Pa. St. 506; *Harrell v. Miller*, 35 Miss. 700. A parol contract for the sale of timber amounts merely to a revocable license: *Armstrong v. Lawson*, 73 Ind. 498. And see *Slocum v. Seymour*, 36 N. J. L. 138; 13 Am. Rep. 432.

6 See citations in next note.

7 See *Kingsley v. Holbrook*, 45 N. H. 313; 86 Am. Dec. 173, n. 182, fully discussing subject; *Sterling v. Baldwin*, 42 Vt. 306; *White v. Foster*, 102 Mass. 375, 378; *Byassee v. Reese*, 4 Met. (Ky.) 372; 83 Am. Dec. 481; *Killmore v. Howlett*, 48 N. Y. 569; *Edwards v. Grand Trunk R. R. Co.* 54 Me. 105. Basis of foregoing matter: 2 *Schouler on Personal Property*, § 451. And see *Story on Sales*, § 263 *a*; 3 *Parsons on Contracts*, 31. Void oral sale of stumpage, valid as a license: *Spalding v. Archibald*, 52 Mich. 365; 50 Am. Rep. 253.

8 *Hallen v. Runder*, 1 Crompt. M. & R. 267. And see *Lee v. Gaskell*, Law R. 1 Q. B. D. 700; 18 Eng. Rep. 131; *Blackburn on Sales*, p. 9; *Bennett's Benjamin on Sales*, §§ 127, 127 *a*; *Campbell on Sales*, 161.

9 See *Cotterell v. Apsley*, 6 Taunt. 322; *Clark v. Bulmer*, 11 Mees. & W. 243; cited, 2 *Schouler on Personal Property*, § 453. Consult, also, *Wood on Frauds*, § 234.

§ 277. *Incorporeal personalty.*—*Shares of stock.* In England, enforcement is allowed of oral contracts for the sale of corporate shares,<sup>1</sup> and even of shares in unincorporated joint stock companies,<sup>2</sup> which are not regarded as coming within the designation of goods, wares, and merchandise in the statute of frauds,<sup>3</sup> or stamp acts,<sup>4</sup> nor as relating to interests in land and so requiring written evidence.<sup>5</sup> But in this country the prevailing doctrine is that a contract for the sale of shares of stock in a manufacturing,<sup>6</sup> mining,<sup>7</sup> or other corporation,<sup>8</sup> must, in the absence of compliance with the other requisites of the statute of frauds,<sup>9</sup> and independently of the use of sufficiently comprehensive words in the statute,<sup>10</sup> be proved by some note or memorandum in writing.<sup>11</sup>

*Negotiable instruments.* Yet the inclination in this country appears to be to exclude promissory notes, as to oral contracts for their sale, from the operation of the clause of the statute of frauds relating to goods, wares, and merchandise,<sup>12</sup> though it is held otherwise as to bank bills,<sup>13</sup> treasury checks,<sup>14</sup> and bonds.<sup>15</sup>

*Things in action.* In the statutes of several of the States, things in action, as well as goods and chattels, are included in the designation and application of the statute;<sup>16</sup> and accounts and judgments have been deemed covered by such phraseology.<sup>17</sup>

*Patent rights.* Even where the liberal rule concerning incorporeal personalty prevails, it is held that an oral agreement for the sale of an interest in an invention before letters patent are obtained, is not a contract for the sale of "goods, wares, or merchandise," within the statute, but is enforceable by bill in equity.<sup>18</sup> But the legal title to a patent right is affected by United States statutes concerning written assignments.<sup>19</sup>

1 See citations in notes after next.

2 *Watson v. Spratley*, 10 Ex. 222, 235, 238; 24 Law J. Ex. 53. And see *Powell v. Jessop*, 18 Com. B. 336, 354, 355; 25 Law J. Com. P. 199.



3 *Humble v. Mitchell*, 10 Ad. & E. 205; *Langdell's Cases on Sales*, 70, 72; *Duncuft v. Albrecht*, 12 Sim. 189, 198; *Watson v. Spratley*, 10 Ex. 222, 233, 238; 24 Law J. Ex. 53. And see *Tempest v. Kilner*, 3 Com. B. 249, 251.

4 *Knight v. Barber*, 16 Mees. & W. 65, 69, 70. And see *Bowlby v. Bell*, 3 Com. B. 234.

5 *Watson v. Spratley*, 10 Ex. 222, 235, 238; 24 Law J. Ex. 53; *Powell v. Jessop*, 18 Com. B. 336, 354, 355; 25 Law J. Com. P. 199; *Bradley v. Holdsworth*, 3 Mees. & W. 422, 424.

6 *Tisdale v. Harris*, 20 Pick. 9; *Langdell's Cases on Sales*, 75.

7 *Mayer v. Child*, 47 Cal. 142.

8 See citations in second note after next.

9 See *Fay v. Wheeler*, 44 Vt. 232, 233; *Mayer v. Child*, 47 Cal. 142.

10 See *South. Life Ins. etc. Co. v. Cole*, 4 Fla. 359, 373.

11 *Tisdale v. Harris*, 20 Pick. 9, 13, 14; *Langdell's Cases on Sales*, 75, 73, 79; *Boardman v. Cutter*, 128 Mass. 279, 285; *North v. Forest*, 15 Conn. 400, 404; *Pray v. Mitchell*, 60 Me. 430, 434, 435; *Colvin v. Williams*, 3 Har. & J. 38, 42; 5 Am. Dec. 417; *Fine v. Hornsby*, 2 Mo. App. 61, 64; *Mayer v. Child*, 47 Cal. 142. *Contra*, see *Vawter v. Griffin*, 40 Ind. 533, 600, 603. And compare *Green v. Brookins*, 23 Mich. 48, 51; *Galsdon v. Lance*, 1 McMull. Eq. 87, 88; 37 Am. Dec. 543. Question not passed on because contract executed in case of an interest in a stage company claimed to be held in a species of partnership like shares in joint stock companies: *Huntley v. Huntley*, 114 U. S. 394, 399.

12 *Whittemore v. Gibbs*, 24 N. H. 484, 488. And see *Abbott v. Shepard*, 48 N. H. 14, 17; *Vawter v. Griffin*, 40 Ind. 593, 600, 602. Compare *Hudson v. Weir*, 29 Ala. 294, 298. *Contra*, see *Baldwin v. Williams*, 3 Met. 365, 367; *Langdell's Cases on Sales*, 82, 84, 85.

13 See *Gooch v. Holmes*, 41 Me. 523, 528; *Riggs v. Magruder*, 2 Cranch C. C. 143.

14 *Beers v. Crowell*, Dud. (Ga.) 23, 29, 30.

15 *Hagar v. King*, 28 Barb. 200, 205, 206. But compare *Haseltine v. Siggers*, 1 Ex. 856, 858, 859.

16 See *Hagar v. King*, 38 Barb. 200, 205; *Artcher v. Zeh*, 5 Hill, 200, 203, 204; *Langdell's Cases on Sales*, 350.

17 See *Walker v. Supple*, 54 Ga. 178, 179; *Armstrong v. Cushney*, 43 Barb. 340, 341, 342; *Truax v. Slater*, 86 N. Y. 630, 631. But judgments have been held not to come under the statute as an interest in land (*Winberry v. Koonce*, 1 Barb. 379, 387); nor as goods, wares, and merchandise: See *Abbott v. Shepard*, 48 N. H. 14, 17. A contract for the sale of gold as a commodity is within the statute: *Peabody v. Speyers*, 56 N. Y. 230.

18 *Somerby v. Buntin*, 118 Mass. 279; 2 Schouler on Personal Property, § 454, p. 463, n. 4; referring, also, to *Burke v. Partridge*, 58 N. H. 349, 353; *Blakeney v. Goode*, 30 Ohio St. 350. But see *Galpin v. Atwater*, 29 Conn. 98.

19 See U. S. Rev. Stats. § 4898; 1 Schouler on Personal Property, § 523. Copyright of book: See *Gould v. Banks*, 24 Am. Dec. 91.

§ 278. Prescribed amount. — “Price” or “value.” In England, the effect of Lord Tenterden’s Act has been to substitute “value” for “price” in the clause fixing the

lower limit of sales of goods, etc., subject to the original statute of frauds;<sup>1</sup> but "price" is the word still used in the statutes of most, if not all of the American States.<sup>2</sup>

*Statutory sum.* The sum of "£10 or upwards" has always been the English standard of price or value,<sup>3</sup> and in the United States a preference has always been shown for a similar standard, computed in federal money, but the precise amount prescribed varies with local legislation from thirty to fifty dollars, and sometimes even reaches as high as two hundred dollars.<sup>4</sup>

*Proof that standard reached.* The price or value is not to be presumed to reach the statutory sum, but on the contrary, the party claiming the protection of the statute must show affirmatively that his case falls under it.<sup>5</sup> Yet a case may, upon proper proof, be brought within the provisions of the statute, at least where the word "value" is substituted for "price" therein, although the contract itself leaves it doubtful whether a price less than the statute standard might not have been agreed upon.<sup>6</sup>

*Purchase of several articles.* Where several articles are purchased from the same person at the same time, the criterion for determining the application of the statute is found in the total price or value of all the articles embraced under a single sale transaction.<sup>7</sup>

1 See Act 9, George IV. ch. 14, § 7; *Harman v. Reeve*, 18 Com. B. 587; 25 Law J. Com. P. 257; *Langdell's Cases on Sales*, 90; *Campbell on Sales*, 162.

2 See *Browne on Statute of Frauds* (4th ed.), Appx.

3 See Act 29, Charles II. § 17; Act 9, Geo. IV. ch. 14, § 7.

4 See *Browne on Statute of Frauds* (4th ed.), Appx.; 2 *Schouler on Personal Property*, § 455, whence preceding paragraph also derived. And consult *Story on Sales*, § 259, n. 1; *Bennett's Benjamin on Sales*, § 91, n. c; 1 *Reed on Statute of Frauds*, § 220; *Stims. Am. Stat. Law*, p. 462, § 4144.

5 See *Crookshank v. Burrell*, 18 Johns. 58; 9 Am. Dec. 187; *Langdell's Cases on Sales*, 32; *Browne on Statute of Frauds*, § 311.

6 *Harman v. Reeve*, 18 Com. B. 587; 25 Law J. Com. P. 257; *Langdell's Cases on Sales*, 90; as cited, 2 *Schouler on Personal Property*, § 455, whence preceding paragraph also derived, here referring also

to *Watts v. Friend*, 10 Barn. & C. 446; *Langdell's Cases on Sales*, § 63; *Browne on Statute of Frauds*, § 312. And consult 1 *Corbin's Benjamin on Sales*, § 137, n. 4; *Bennett's Benjamin on Sales*, § 136, n. c; citing, *Carpenter v. Galloway*, 73 Ind. 418; *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402.

7 See *Baldey v. Parker*, 2 Barn. & C. 37; *Langdell's Cases on Sales*, 85; *Ross' Leading Cases*, 463; *Story on Sales*, § 261; 2 *Schouler on Personal Property*, § 455; referring, also, to *Gilman v. Hill*, 36 N. H. 311; and comparing *Jenness v. Wendell*, 51 N. H. 63; 12 Am. Rep. 48. Consult further, 1 *Chitty on Contracts* (11th Am. ed.), 532, 533; *Bennett's Benjamin on Sales*, §§ 134, 135; 1 *Corbin's Benjamin on Sales*, § 135, n. 2, and cases reviewed; 2 *Kent Com.* (13th ed.) p. 724, n. 3; *Wood on Frauds*, § 237.

§ 279. *Earnest or part payment.*—*As equivalent acts, etc.* The original statute of frauds, in enumerating the acts which would exempt a sale of goods from the requirement of a written note or memorandum of the bargain, provides that the buyer may “give something in earnest to bind the bargain, or in part payment”;<sup>1</sup> but of the two modes thus presented, the former has so fallen into disuse,<sup>2</sup> that earnest and part payment are often treated at the present day as meaning the same thing;<sup>3</sup> while in some of the States of the Union the local enactments omit the word “earnest” altogether, and simply require that the buyer shall “at the time pay some part of the purchase money.”<sup>4</sup>

*Thing of value computable in money.* It seems to be now well settled, under our statute of frauds, that whatever is given must be parted with in money, or money's worth, and must be something of value, however slight.<sup>5</sup>

*Subsequent to oral bargain.* But it appears that the statute is satisfied although the giving of earnest or part payment takes place subsequently to the oral bargain.<sup>6</sup>

*Acceptance, etc.* A mere offer or tender of earnest or part payment is insufficient, but the seller must accept and receive the same.<sup>7</sup>

*Deposit with third party.* And there is not such a giving of earnest or part payment as the statute per-

mits, by the deposit of money by the parties to an oral sale with a third person, to be by him paid to either of such parties, if the other neglects to fulfill his part of the bargain.<sup>8</sup>

*Offset stipulation.* Where chattels are sold under an oral contract which comes within the purview of the statute, and it is part of the same contract that the buyer shall, in consideration of the sale, offset a debt due him from the seller, and pay the residue, this offset stipulation alone has not the effect of a part payment by the buyer.<sup>9</sup>

1 See Stat. 29, Charles II. ch. 3, § 17. Concurrence of part payment with acceptance and receipt: *Richardson v. Squires*, 57 Vt. 640; *Allen v. Aguirre*, 3 Seld. 543.

2 See 2 Kent Com. 496, n. b.

3 See *Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306; *Browne on Statute of Frauds*, § 341; *Story on Sales*, § 273; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, § 189; 1 *Bouvier Law Dict.* tit. Earnest (14th ed.), 515. Distinction in civil law and under ancient English custom, whereby "earnest" covered a gift or other token that the bargain was concluded while "part payment" was in money and on account of price: See Dig. 19, 1, 11, § 6; *Bennett's Benjamin on Sales*, § 139; citing illustrative cases of *Bach v. Owen*, 2 Black. II. 313; *Goodall v. Skelton*, 5 Term Rep. 409; and referring to *Bissell v. Balcom*, 39 N. Y. 275.

4 See *Organ v. Stewart*, 60 N. Y. 413; Cal. Civ. Code, § 1739; *Browne on Statute of Frauds* (4th ed.), Appx.; 2 *Schouler on Personal Property*, § 476, whence paragraph derived. And see *Wood on Frauds*, § 282, n. 2, 290, 293.

5 *Artcher v. Zeh*, 5 Hill, 200; *Langdell's Cases on Sales*, 320; *Browne on Statute of Frauds*, § 341; *Krohn v. Buntz*, 68 Ind. 277; *White v. Drew*, 56 How. Pr. 53, 57. Check or third party's bill or note may be sufficient part payment: See *Hunter v. Wetsell*, 84 N. Y. 549; 33 Am. Rep. 544; *Griffiths v. Owen*, 13 Mees. & W. 58. But compare *Noakes v. Morey*, 30 Ind. 103, 110; *Krohn v. Buntz*, 68 Ind. 277; *Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306. Compare *Sharp v. Carroll*, 27 N. W. Rep. (Wis.) 82. Crossing buyer's hand with coin under ancient custom, and returning coin to pocket, insufficient as earnest: See *Goodall v. Skelton*, 2 Black. II. 316; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Langdell's Cases on Sales*, 117.

6 See *Walker v. Nussey*, 16 Mees. & W. 302; *Langdell's Cases on Sales*, 326; *Thompson v. Alger*, 12 Met. 423; *Langdell's Cases on Sales*, 326, n. 1; *Story on Sales*, § 273, a; *Browne on Statute of Frauds*, § 343. Expression "at the time" in New York and Wisconsin statutes: See *Bissell v. Balcom*, 39 N. Y. 275; *Hawley v. Keeler*, 53 N. Y. 114; *Hunter v. Wetsell*, 84 N. Y. 375; 84 N. Y. 549; 38 Am. Rep. 544; *Bates v. Chesebro*, 32 Wis. 594; *Paine v. Fulton*, 34 Wis. 83. Earnest, etc., does not transfer full title: See *Bach v. Owen*, 5 Term Rep. 409; *Nesbitt v. Burry*, 25 Pa. St. 203; *Groat v. Gile*, 51 N. Y. 431; 1 *Bouvier Law Dict.* tit. Earnest (14th ed.), 515; citing, 2 Blackst. Com. 447; 2 Kent Com. 495. But see *Hinde v. Whitehouse*, 7 East, 553; *Langdell's Cases on Sales*, 102.

7 See *Hicks v. Cleveland*, 48 N. Y. 84; *Hawley v. Keeler*, 53 N. Y. 114; *Edgerton v. Hodge*, 41 Vt. 676.

8 See *Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306. *Noakes v. Morey*, 30 Ind. 103.

9 See *Walker v. Nussey*, 16 Mees. & W. 302; *Langdell's Cases on Sales*, 326; *Artcher v. Zeh*, 5 Hill, 500; *Langdell's Cases on Sales*, 330; *Matthiessen Refining Co. v. McMahon*, 38 N. J. L. 536; *Mattice v. Allen*, 3 Keyes, 492. But compare *Dow v. Worthen*, 37 Vt. 108; *Cotterill v. Stevens*, 10 Wis. 422; *Paine v. Fulton*, 34 Wis. 83. Basis of foregoing matter, further discussing topics treated: 2 *Schouler on Personal Property*, §§ 476-479; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, §§ 189-194, and notes; *Campbell on Sales*, 195; *Story on Sales*, 273-275. And see *Wood on Frauds*, § 294.

§ 280. *Delivery.*—*Statutory provisions.* In regard to the alternative act of part performance, consisting of the buyer's acceptance and actual receipt of a portion of the subject-matter of the sale, in the original statute of frauds, substantially followed in American legislation in most of the States, the exemption is stated to be, "except the buyer shall accept part of the goods so sold, and actually receive the same."<sup>1</sup>

*Requisites of delivery.* And though the statute is generally silent as to acts of performance by the seller,<sup>2</sup> yet as a basis for actual receipt and acceptance by the buyer, there must be a full delivery by the seller,<sup>3</sup> such as divests him not only of his lien, but the buyer also perhaps of his right of return for divergence of the goods from the contract in kind or quantity, and constitutes a complete and permanent surrender of possession with an intention of vesting the right of possession in the vendee.<sup>4</sup>

*Insufficiency of delivery or seller's acts alone.* But delivery alone will not take any case out of the statute,<sup>5</sup> nor can the seller render the contract enforceable by any oral act of his own,<sup>6</sup> independently of the buyer's performance.<sup>7</sup>

1 29 Charles II. ch. 3, § 17. See comments in note to *Shindler v. Houston*, 49 Am. Dec. 326. But in States whose codes make express mention of incorporeal chattels, the phraseology is, "shall accept and receive part of such goods or the evidences, or some of them, of such things in action": *Browne on Statute of Frauds* (4th ed.) Appx.; *Cal. Civ. Code*, § 1739.

2 See *Boardman v. Spooner*, 13 Allen, 357; *Langdell's Cases on Sales*, 610; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55. Compare *Bullock v. Tschergi*, 13 Fed. Rep. 345.

3 See note to *Shindler v. Houston*, 49 Am. Dec. 327. The transmission of a bill of lading has been held to amount to the actual delivery of the property described in it, and is a compliance with the statute of frauds as to the sale and delivery of property: *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51.

4 See *Marsh v. Rouse*, 44 N. Y. 643; *Maxwell v. Brown*, 39 Me. 98; *Brandt v. Focht*, 1 Abb. N. Y. App. 185; *Phillips v. Bistolli*, 2 Barn. & C. 511; *Browne on Statute of Frauds*, §§ 316-333; *Story on Sales*, § 276. And consult note on Delivery under Statute of Frauds, to *Jamison v. Simon*, 8 Pacif. Rep. 503. Sufficiency of symbolical delivery: *King v. Jarman*, 35 Ark. 190; 37 Am. Rep. 11, n. 16. Insufficiency of delivery to carrier: *Hausman v. Nye*, 62 Ind. 485; 30 Am. Rep. 199.

5 See *Maxwell v. Brown*, 39 Me. 98; 63 Am. Dec. 605, 606.

6 See citations in next note. And consult note to *Shindler v. Houston*, 49 Am. Dec. 328.

7 See *Nichols v. Morse*, 100 Mass. 523; *Marsh v. Rouse*, 44 N. Y. 643; *Hawley v. Keeler*, 53 N. Y. 114; *Maxwell v. Brown*, 39 Me. 101; 63 Am. Dec. 605. Mere words insufficient: See *Shepherd v. Pressey*, 32 N. H. 55; *Bowers v. Anderson*, 49 Ga. 143. And consult note to *Shindler v. Houston*, 49 Am. Dec. 334. Basis of most of foregoing matter, further discussing subject: 2 *Schouler on Personal Property*, §§ 459, 460; *Bennett's Benjamin on Sales*, § 142, n. 9; 1 *Corbin's Benjamin on Sales*, § 139, n. 1. To satisfy the statute of frauds, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee liable for the price, which acceptance must be voluntary and unconditional: *Caulkins v. Hellman*, 47 N. Y. 452; 7 Am. Rep. 461; as cited, *Jamison v. Simon*, 68 Cal. 17.

§ 281. **Acceptance and receipt.**—*Concurrence.* The preponderance of authorities at the present day justifies the framers of the statute of frauds by decidedly favoring a discrimination between acceptance and actual receipt.<sup>1</sup> And there must be a concurrence of acceptance and actual receipt in order to satisfy the statute.<sup>2</sup>

*Order of time.* But though it would usually occur, contrary to the order of the words in the statute, that the actual receipt of the goods would precede acceptance, yet it is not necessary that the acceptance should follow the receipt of the goods, or be contemporaneous therewith,<sup>3</sup> but acceptance prior to actual receipt will satisfy the statute.<sup>4</sup>

*Of part of goods.* Acts of performance may relate to the whole as well as a part of the subject-matter of sale;<sup>5</sup>

but the acceptance and receipt of a part will satisfy the statute as to the whole, where it is shown to be on account of the whole, if attaching even to the slightest portion of the goods, as a single lot, or a sample not designed as a mere specimen to induce a future bargain,<sup>6</sup> and although the rest of the goods are yet to be made to order, or the entire contract covers various lots or articles of different kinds and qualities.<sup>7</sup>

*Relation to lien and title.* There can be no acceptance and receipt while the seller still retains that lien,<sup>8</sup> whereby he intends to prevent his possessory right from passing to the buyer,<sup>9</sup> and on the suggestion that "actual receipt" is to be tested by the loss of the seller's lien, sales in which the transfer of title is conditional upon payment have often and perhaps generally been regarded as involving such a price-lien as must render the statutory compliance impossible;<sup>10</sup> but it has been held that there may be such acceptance and receipt as satisfies the statute, even though the goods were sold upon condition that the property therein should not pass until the price was paid.<sup>11</sup>

*Buyer's possession and control.* Where unbroken horses were gathered in corrals and partly selected, and turned into the seller's pasture after they were broken, it was held that there was no acceptance and receipt of them within the meaning of the statute of frauds, as none of the horses forming the subject-matter of the contract ever passed into the absolute possession and control of the buyer.<sup>12</sup>

1 See Blackburn on Sales, 22, 23; Bennett's Benjamin on Sales, § 139, 156, b; 1 Corbin's Benjamin on Sales, §§ 139, 157; 1 Bouvier Law Dict. tit. Acceptance (14th ed.), 47; 2 Kent Com. (13th ed.) 724, n.; also, note to Shindler v. Houston, 49 Am. Dec. 327; Cooke v. Millard, 65 N. Y. 352; 22 Am. Rep. 619, 630; Taylor v. Mueller, 30 Minn. 343; 44 Am. Rep. 199, 203. But the terms have sometimes been thought equivalent: See Castle v. Swarder, 6 Hurl. & N. 832; Langdell's Cases on Sales, 257; Marvin v. Wallis, 6 El. & B. 726; Langdell's Cases on Sales, 278. And not only are the terms "acceptance" and "actual receipt" often interchanged in legal discussion, but the statute is

construed as though it put as a test the seller's act of delivery, instead of the buyer's performance: See *Holmes v. Hoskins*, 5 Ex. 753.

2 See *Cusack v. Robinson*, 1 Best & Smith, 299, 306; *Langdell's Cases on Sales*, 266; *Campbell on Sales*, 168; relying, also, on *Smith v. Hudson*, 6 Best & Smith, 168; *Langdell's Cases on Sales*, 275. And consult *Wood on Frauds*, § 305; *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619, 630; also, note to *Shindler v. Houston*, 49 Am. Dec. 327; quoting, *Hewes v. Jordan*, 39 Md. 480; 17 Am. Rep. 578. Effect of such concurrence: *Browne on Statute of Frauds*, § 339; *Danforth v. Walker*, 40 Vt. 257; *Rappleve v. Adees*, 1 Thomp. & C. 126. And compare *Taylor v. Wakefield*, 6 El. & B. 765.

3 See citations in next note. And consult note to *Shindler v. Houston*, 49 Am. Dec. 330.

4 *Cusack v. Robinson*, 1 Best & Smith, 299; *Langdell's Cases on Sales*, 266; *Campbell on Sales*, 168; *Bennett's Benjamin on Sales*, § 157; 1 *Corbin's Benjamin on Sales*, § 158, n. 10. And see 2 *Kent Com.* (13th ed.) p. 724, n. 4; *Wood on Frauds*, § 306; 2 *Schouler on Personal Property*, § 465; citing, also, *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721; *Marsh v. Hyde*, 3 Gray, 331; *Langdell's Cases on Sales*, 313; *Buckingham v. Osborne*, 44 Conn. 133. Both acts may be subsequent to the agreement of sale, if not unreasonably later: See *Browne on Statute of Frauds*, § 337; *Story on Sales*, § 280 a; *Bush v. Holmes*, 53 Me. 417; *Marsh v. Hyde*, 3 Gray, 331; *Langdell's Cases on Sales*, 313; *McKnight v. Dunlop*, 5 N. Y. 537; *Langdell's Cases on Sales*, 308; *McCarthy v. Nash*, 14 Minn. 127; *Amson v. Dreher*, 35 Wis. 615. But both should be performed before the contract is sued upon: See *Bill v. Bament*, 9 Mees. & W. 36; *Langdell's Cases on Sales*, 161; *Tisdale v. Harris*, 20 Pick. 9; *Langdell's Cases on Sales*, 75; *Browne on Statute of Frauds*, §§ 333, 348; *Wood on Frauds*, § 307.

5 See *Saunders v. Topp*, 4 Ex. 390; *Langdell's Cases on Sales*, 190; *Simmonds v. Humble*, 13 Com. B. N. S. 258; *Langdell's Cases on Sales*, 272.

6 See citations in next note.

7 See *Elliott v. Thomas*, 3 Mees. & W. 170; *Langdell's Cases on Sales*, 145; *Scott v. Eastern etc. R. R. Co.* 12 Mees. & W. 31; *Langdell's Cases on Sales*, 161; *Hinde v. Whitehouse*, 7 East, 553; *Langdell's Cases on Sales*, 102; *Gault v. Brown*, 48 N. H. 183; *Jenness v. Wendell*, 51 N. H. 63; 12 Am. Rep. 48; *Mills v. Hunt*, 20 Wend. 431; *Langdell's Cases on Sales*, 285; *Bennett's Benjamin on Sales*, §§ 141, 167, 168; 1 *Corbin's Benjamin on Sales*, § 141, n. 3, and §§ 166, 168, notes; also consult note to *Shindler v. Houston*, 49 Am. Dec. 338, 339, and index to *Langdell's Cases on Sales*, p. 1021. But see *Price v. Lea*, 1 Barn. & C. 156; *Langdell's Cases on Sales*, 129. Giving of sample: See, also, *Wood on Frauds*, §§ 309, 310; *Rohde v. Thwaites*, 6 Barn. & C. 388; *Langdell's Cases on Sales*, 138; *Klinitz v. Surry*, 5 Esp. 267; *Langdell's Cases on Sales*, 345; *Gardner v. Grant*, 2 Com. B. N. S. 340; *Langdell's Cases on Sales*, 237; *Kibble v. Gough*, 38 L. T. N. S. 204; *Rickard v. Moore*, 38 L. T. N. S. 841; *Knight v. Mann*, 118 Mass. 143; *Remick v. Sandford*, 120 Mass. 309. Taking part on account of whole: See *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275; *Bush v. Holmes*, 53 Me. 417; *Danforth v. Walker*, 40 Vt. 257; *Davis v. Eastman*, 1 Allen, 422; *Stone v. Browning*, 51 N. Y. 211. Part acceptance and receipt by one of several joint purchasers: *Smith v. Milliken*, 7 Lans. 336. Actions and obligations of parties after part acceptance and receipt: See *Story on Sales*, § 279; *Atwood v. Lucas*, 53 Me. 508; *Richardson v. Squires*, 37 Vt. 640.

8 Divesting of vendor's lien necessary: See note to *Shindler v. Houston*, 49 Am. Dec. 331.



9 See *Baldey v. Parker*, 2 Barn. & C. 37; *Langdell's Cases on Sales*, 85; *Holmes v. Hoskins*, 9 Ex. 753; *Langdell's Cases on Sales*, 215; *Safford v. McDonough*, 120 Mass. 230. Compare *Dodsley v. Varley*, 12 Ad. & E. 632; *Langdell Cases on Sales*, 155; *Wright v. Percival*, 8 Law J. N. S. Q. B. 258.

10 See *Mabberly v. Sheppard*, 10 Bing. 99; *Langdell's Cases on Sales*, 142; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 630; *Langdell's Cases on Sales*, 121; *Carter v. Toussaint*, 5 Barn. & Ald. 855; *Langdell's Cases on Sales*, 126; *Castle v. Sworder*, 29 Law J. Ex. 235; 30 Law J. Ex. 310; *Langdell's Cases on Sales*, 257; *Stone v. Browning*, 51 N. Y. 211; *Bennett's Benjamin on Sales*, §§ 187, 188. And consult note to *Shindler v. Houston*, 49 Am. Dec. 329.

11 *Pinkham v. Mattox*, 53 N. H. 600. Basis of foregoing matter: 2 *Schouler on Personal Property*, §§ 460-465, and other sources cited in preceding paragraphs.

12 *Terney v. Doten*, 11 Pac. Rep. (Cal.) 743.

§ 282. **Acceptance.** — *In general.* Acceptance of part of the goods has been said to be an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract.<sup>1</sup>

*Precluding objection, etc.* And while some decisions consider that an acceptance and receipt, to satisfy the statute, need not go so far as to preclude the buyer from objecting to the goods,<sup>2</sup> the more recent cases establish<sup>3</sup> that there can be no acceptance where there has been no opportunity<sup>4</sup> of rejecting the goods.<sup>5</sup>

*Inspection and examination.* Acceptance being an act which, from its nature, requires more deliberation and involves more consequences than receipt, should not, unless given in advance, be inferred before the buyer had reasonable chance and time, greater in the case of unascertained goods, to inspect and examine the goods and determine upon their correspondence with the contract.<sup>6</sup>

*Receipt by carrier or custodian.* And an agent with authority from the buyer to receive is not necessarily the buyer's authorized agent to perform the larger act of acceptance;<sup>7</sup> so that delivery to a carrier,<sup>8</sup> or to a wharfinger or other similar custodian for the seller,<sup>9</sup>

and his actual receipt of the goods, though transferring title and risks, constitute in the absence of special authority,<sup>10</sup> no such acceptance as would bind the purchaser and satisfy the statute.<sup>11</sup>

1 Blackburn on Sales, 22, 23. Consult, also, Wood on Frauds, § 305; 1 Bouvier Law Dict. tit. Acceptance (14th ed.), 47; 2 Kent Com. (13th ed.) p. 724, n. 4; Campbell on Sales, 163; citing, *Bowes v. Pontifex*, 3 Post. & F. 739. Distinction drawn between acceptance satisfying statute and that conclusively showing fulfillment of contract: *Morton v. Tibbett*, 15 Q. B. 428; *Langdell's Cases on Sales*, 195; *Bennett's Benjamin on Sales*, §§ 149, 150, and notes; *Remick v. Sandford*, 120 Mass. 309. And see *Kibble v. Gough*, 38 L. T. N. L. 204; *Rickard v. Moore*, 38 L. T. N. S. 841. But see *contra*, *Simpson v. Krumdick*, 38 Minn. 352. A refusal to take the goods, whether on false or frivolous grounds, or none at all, precludes the idea of acceptance; and the question of acceptance is one of the intention of the buyer as signified by his outward acts: *Blackburn on Sales*, 22, 23. Question one of fact for jury, etc.: See *Story on Sales*, § 273; *Hopton v. McCarthy*, 10 Law R. Ir. 263, and cases cited. And consult note to *Shindler v. Houston*, 49 Am. Dec. 339, 340. Acceptance may precede receipt, but especially in the case of goods not yet specified, may be contemporaneous with receipt or immediately follow it: See *Cusack v. Robinson*, 1 Best & Smith, 299; *Langdell's Cases on Sales*, 263; *Nicholson v. Bower*, 1 El. & E. 172; *Langdell's Cases on Sales*, 213; *Saunders v. Topp*, 4 Ex. 390; *Langdell's Cases on Sales*, 190; *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275; *Maxwell v. Brown*, 39 Me. 98; 63 Am. Dec. 665; *Gorham v. Fisher*, 30 Vt. 53; *Gilman v. Hill*, 36 N. H. 311; *Knight v. Mann*, 118 Mass. 143; *Stone v. Browning*, 51 N. Y. 211; *Knoblauch v. Kronschnabel*, 18 Minn. 309. *Contra*, compare *Morton v. Tibbett*, 15 Q. B. 428; *Langdell's Cases on Sales*, 195; stated at length, *Wood on Frauds*, § 317.

2 See *Morton v. Tibbett*, 15 Q. B. 428; *Langdell's Cases on Sales*, 195; *Garfield v. Paris*, 96 U. S. 557; 8 Fed. Dec. 671.

3 Consult *Hewes v. Jordan*, 39 Md. 472; 17 Am. Rep. 578.

4 See *Wood on Frauds*, § 325.

5 See *Bennett's Benjamin on Sales*, §§ 149, 155; citing, *Castle v. Sworder*, 6 Hurl. & N. 832; *Langdell's Cases on Sales*, 257; *Hunt v. Hecht*, 8 Ex. 814; *Langdell's Cases on Sales*, 208; *Coombs v. Bristol*, etc. R. R. Co. 3 Hurl. & N. 510; *Langdell's Cases on Sales*, 242; also, *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275. *Contra*, *Cusack v. Robinson*, 1 Best & Smith, 299; *Langdell's Cases on Sales*, 266; *Currie v. Anderson*, 2 El. & E. 592; *Langdell's Cases on Sales*, 252. And see *Parker v. Wallis*, 5 El. & B. 21; *Langdell's Cases on Sales*, 218. Consult discussion of subject in *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619, 630-634; note to *Shindler v. Houston*, 49 Am. Dec. 331-334.

6 See *Hewes v. Jordan*, 39 Md. 477; 17 Am. Rep. 587; *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275; *Bog Lead Mining Co. v. Montague*, 10 Com. B. N. S. 481; quoted in *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619, 631. And consult 2 Kent Com. (13th ed.) p. 724, n. 4.

7 Acceptance by agents: See *Wood on Frauds*, § 332, and note to *Shindler v. Houston*, 49 Am. Dec. 339.

8 See citations in note at end of paragraph. And consult *Ather-ton v. Newhall*, 123 Mass. 141; 25 Am. Rep. 47.

9 See *Hart v. Bush*, El. B. & E. 494; *Langdell's Cases on Sales*, 239; *Hunt v. Hecht*, 8 Ex. 814; *Langdell's Cases on Sales*, 208; *Quintard v. Bacon*, 99 Mass. 185.

10 See *Snow v. Warner*, 10 Met. 132; 43 Am. Dec. 417; *Spencer v. Hale*, 30 Vt. 314; 73 Am. Dec. 309, 310. But compare *Caulkins v. Hellman*, 14 Hun, 330.

11 See *Coombs v. Bristol, etc. R. R. Co.* 3 Hurl. & N. 510; *Langdell's Cases on Sales*, 242; *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275; *Bennett's Benjamin on Sales*, § 160; *Norman v. Phillips*, 14 Mees. & W. 277; *Langdell's Cases on Sales*, 171; *Hopton v. McCarthy*, 10 Law R. Ir. 266; *Rodgers v. Phillips*, 40 N. Y. 519; *Langdell's Cases on Sales*, 316; *Story on Sales*, § 276; *Maxwell v. Brown*, 39 Me. 98; 63 Am. Dec. 605; *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545; *Jones v. Mechanics' Bank*, 29 Md. 237. And consult *Wood on Frauds*, § 333. Base of foregoing matter: 2 *Schouler on Personal Property*, §§ 466-468, and other works as cited in notes. It is said that a common carrier, whether selected by the seller or by the buyer, to whom the goods are intrusted without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer, and to take the case out of the statute of frauds: *Johnson v. Cuttle*, 105 Mass. 449; 7 Am. Rep. 545; as quoted, *First Nat. Bank v. McAndrews*, 5 Mont. 325 · 51 Am. Rep. 51.

§ 283. What constitutes acceptance. — *Direct and constructive acceptance.* A buyer accepts goods in the fullest sense, where upon inspection he declares in unmistakable terms his satisfaction with the goods, and his intention to retain them.<sup>1</sup> But though acceptance to satisfy the statute should be distinct and unequivocal, yet it is well settled that the buyer's own acts and conduct may be construed into a binding acceptance.<sup>2</sup>

*Exercise of ownership.* Thus very strong proof of the intention to accept is furnished by some decisive act of ownership on the buyer's part,<sup>3</sup> as where he sells the goods to another person, pledges, lends, gives, or consumes the articles, takes exclusive possession of them as his own,<sup>4</sup> or otherwise clearly assumes dominion over them,<sup>5</sup> or even, though less positively of itself, where he unreasonably delays returning the goods,<sup>6</sup> or giving notice of their rejection.<sup>7</sup>

*Keeping bills of lading.* Keeping unreasonably long the *indicia* of title, such as bills of lading, may amount

to a statutory acceptance of the goods which they represent, especially if the buyer in other respects acts as owner of the goods.<sup>8</sup>

*Marking goods.* But marking the goods with the purchaser's name or initials is not conclusive of acceptance in itself, and whether it should constitute acceptance or not seems to depend upon the surrounding circumstances, and especially upon the buyer's participation in such act.<sup>9</sup>

*Equivocal acts, etc.* And in general equivocal acts on the buyer's part are not readily construed into a statute of acceptance, unless aided by the lapse of time or other favoring circumstances.<sup>10</sup>

*Intention to be manifested.* But some act or conduct on the part of the vendee or his authorized agent, manifesting an intention to accept the goods as a performance of the contract and to appropriate them, is required to supply the place of a written contract.<sup>11</sup>

1 See *Simmonds v. Humble*, 13 Com. B. N. S. 253; *Langdell's Cases on Sales*, 272; *Cusack v. Robinson*, 1 Best & Smith, 239; *Langdell's Cases on Sales*, 266; *Saunders v. Topp*, 4 Ex. 390; *Langdell's Cases on Sales*, 190. And consult *Caulkins v. Helman*, 47 N. Y. 452; 7 Am. Rep. 461; as cited, *Jamison v. Simon*, 68 Cal. 17; 8 Pacif. Rep. 502.

2 2 Schouler on Personal Property, § 469, whence preceding paragraph also mainly derived. And see *Wood on Frauds*, §§ 314, 315. Acceptance must be voluntary and unconditional: *Caulkins v. Helman*, 47 N. Y. 452; 7 Am. Rep. 461; as cited, *Jamison v. Simon*, 68 Cal. 17; 8 Pacif. Rep. 502.

3 See citations in succeeding notes. Dealing with the property as owner, as by a sale, pledge, or otherwise, or detention of the property, or its control beyond a reasonable time for inspection and rejection, is evidence of an acceptance: *Taylor v. Mueller*, 38 Minn. 343; 44 Am. Rep. 199, 202.

4 Using goods as owner: *Wood on Frauds*, § 316.

5 See *Chaplin v. Rogers*, 1 East, 192; *Langdell's Cases on Sales*, 97; *Beaumont v. Brengeri*, 5 Com. B. 301; *Langdell's Cases on Sales*, 185; *Morton v. Tibbett*, 15 Q. B. 428; *Langdell's Cases on Sales*, 195; *Pinkham v. Mattox*, 53 N. H. 604; *Marshall v. Green*, Law R. 1 C. P. D. 35; 15 Eng. Rep. 218.

6 Waiver of right of repudiation: See *Spencer v. Halé*, 30 Vt. 314; 73 Am. Dec. 309, 311.

7 See *Coleman v. Gibson*, 1 Moody & R. 168; *Langdell's Cases on Sales*, 141; *Farina v. Home*, 16 Mees. & W. 119; *Langdell's Cases on Sales*, 180; *Meredith v. Meigh*, 2 El. & B. 364; *Langdell's Cases on*

Sales, 203; *Hunter v. Leavitt*, 36 Ind. 141; *Treadwell v. Reynolds*, 39 Conn. 31; *Thompson v. Menck*, 4 Abb. N. Y. App. 400; *Rappleye v. Ade*, 1 Thomp. & C. 126. Basis of paragraph: 2 Schouler on Personal Property, § 469, with various supplementary cases. And consult Bennett's Benjamin on Sales, §§ 144, 146; *Campbell on Sales*, 171-180, classifying outward acts of acceptance; *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199, 202; stated at length in *Wood on Frauds*, § 318.

8 *Currie v. Anderson*, 2 El. & E. 592; *Langdell's Cases on Sales*, 252; *Meredith v. Meigh*, 2 El. & B. 364; *Langdell's Cases on Sales*, 203. See *Wood on Frauds*, § 315. But compare *Quintard v. Bacon*, 99 Mass. 185.

9 See Bennett's Benjamin on Sales, § 166; citing, *Anderson v. Scott*, 1 Camp. 235, *n*; *Langdell's Cases on Sales*, 101; disapproved in *Saunders v. Topp*, 4 Ex. 390; *Langdell's Cases on Sales*, 160; *Rappleye v. Ade*, 1 Thomp. & C. 126. And consult *Wood on Frauds*, § 319.

10 *Shindler v. Houston*, 1 Comst. 261; *Langdell's Cases on Sales*, 290; 49 Am. Dec. 316, 317, and cases cited. Basis of foregoing matter, further discussing insufficient proof of acceptance: 2 Schouler on Personal Property, § 469; citing, *Hunt v. Hecht*, 8 Ex. 814; *Langdell's Cases on Sales*, 208; *Hewes v. Jordan*, 39 Md. 472; 17 Am. Rep. 578; *Hopton v. McCarthy*, 10 Law R. Ir. 266; *Maberley v. Sheppard*, 10 Bing. 99; *Langdell's Cases on Sales*, 142; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Langdell's Cases on Sales*, 121; *Holmes v. Hoskins*, 9 Ex. 753; *Langdell's Cases on Sales*, 215; *Curtis v. Pugh*, 10 Q. B. 111; *Langdell's Cases on Sales*, 183; *Smith v. Hudson*, 6 Best & Smith, 431; *Langdell's Cases on Sales*, 275; *Howe v. Palmer*, 3 Barn. & Ald. 557; *Langdell's Cases on Sales*, 115; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Langdell's Cases on Sales*, 125; *Nicholson v. Bower*, 1 El. & E. 172; *Langdell's Cases on Sales*, 248; *Saunders v. Topp*, 4 Ex. 390; *Langdell's Cases on Sales*, 130. Acts which are not evidence of acceptance classified: *Campbell on Sales*, 169-171. Persistent refusal to accept: *Jamison v. Simon*, 63 Cal. 17; 8 Pacif. Rep. 502. And see *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199.

11 *Caulkins v. Helman*, 47 N. Y. 452; 7 Am. Rep. 461; as cited, *Jamison v. Simon*, 63 Cal. 17; 8 Pacif. Rep. 502.

§ 284. *Actual receipt.*—*In general.* The receipt of the goods is the taking possession of them by the buyer, which occurs when the seller gives to the accepting buyer the actual control of the goods, and is often evidence of acceptance, but is not the same thing, since it may be and often is for the express purpose of determining whether to accept or not.<sup>1</sup>

*Requisites.* Actual removal of the goods, in part or wholly, from the custody of the buyer to that of the seller, is a common though not an invariable accompaniment of "actual receipt" by the buyer;<sup>2</sup> but whatever be the buyer's method of receiving possession, the

seller must finally part with his control of the goods, with the intention of vesting the right of possession in the buyer.<sup>3</sup>

*Goods in buyer's custody.* Where the goods are already in the buyer's custody as bailee or agent, his actual receipt as seller occurs when the character of the possession changes,<sup>4</sup> and the buyer, with the seller's consent, ceases to hold in such subordinate capacity, and begins to hold as owner.<sup>5</sup>

*Goods in third person's custody.* And where the goods are in a third person's custody, so that three distinct persons are concerned in effecting a transfer of possession, there need also be no removal of the goods from the custodian's control;<sup>6</sup> but there is an actual receipt by the buyer which satisfies the statute, whenever seller, buyer, and custodian all agree<sup>7</sup> that the custodian shall attorn so as to cease to hold for the seller, and thereafter continue to hold for the buyer.<sup>8</sup>

*Goods in seller's custody.* In the usual case where the goods are in the seller's custody, compliance with the statute is of course conclusively shown by taking possession, with the seller's acquiescence, of the whole or part of the subject-matter of sale, and carrying it away, as this is evidence not only of actual receipt, but of the exercise of an important act of ownership.<sup>9</sup> But it often becomes extremely difficult to say at what precise moment the buyer may be said to receive the goods at the seller's hands, in cases where the intention that a change of possession shall take place is not evinced by any such decisive act as actual removal of the goods and taking them into the buyer's corporeal and separate custody;<sup>10</sup> yet constructive receipt may be shown<sup>11</sup> where the seller holds the goods at the time of the bargain, and then changes the character of his possession,<sup>12</sup> as clearly and distinctly shown, so as to lose his original rights as

seller, and become the buyer's bailee, and continue to hold in that character.<sup>13</sup>

1 See Blackburn on Sales, 22-54. And consult 1 Bouvier Law Dict. tit. Acceptance (14th ed.), 47. "Even the receipt of the goods, without an acceptance, is not sufficient:" *Caulkins v. Helman*, 47 N. Y. 452; 7 Am. Rep. 461; as quoted, *Jamison v. Simson*, 68 Cal. 17; 8 Pac. Rep. 502. Much of the discussion in the courts, however, in cases of doubtful intent, turns upon "acceptance" or "delivery and acceptance," as though the statute has used the word "delivery" instead of "actual receipt", and a full acceptance may usually be expected to carry with it the taking of possession: 2 Schouler on Personal Property, § 471.

2 2 Schouler on Personal Property, § 471, whence paragraph derived. And see Langdell's Cases on Sales, 1022. Receipt of *indicia* of property, such as bills of lading: See *Chaplin v. Rogers*, 1 East, 192; Langdell's Cases on Sales, 97, *Brandt v. Focht*, 1 Abb. N. Y. App. 185.

3 See *Maberley v. Sheppard*, 10 Bing. 99; Langdell's Cases on Sales, 142; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; Langdell's Cases on Sales, 121; *Phillips v. Bistolli*, 2 Barn. & C. 511; Langdell's Cases on Sales, 134. Parting with lien: See Wood on Frauds, §§ 335, 336.

4 See citations in next note. And consult note to *Shindler v. Houston*, 49 Am. Dec. 338.

5 See *Edan v. Dudfield*, 1 Q. B. 302; Langdell's Cases on Sales, 157; *Lillywhite v. Deyereux*, 15 Mees. & W. 285; Langdell's Cases on Sales, 175; *Taylor v. Wakefield*, 6 El. & B. 765; Langdell's Cases on Sales, 234. And consult Wood on Frauds, § 337; Langdell's Cases on Sales, 1023.

6 See Langdell's Cases on Sales, 1023; Wood on Frauds, § 340.

7 See note to *Shindler v. Houston*, 49 Am. Dec. 338.

8 See Blackburn on Sales, 28, 29; Bennett's Benjamin on Sales, 179; Campbell on Sales, 186, 187. The buyer's receipt of *indicia* of title from the vendor, such as a delivery order upon the seller's warehouseman or other bailee, is not of itself a sufficient compliance with the statute, but the English cases require an attornment to the buyer from the custodian, by his assent to hold the goods on the buyer's account, while in some parts of this country it seems to be thought enough for the buyer to give the custodian notice that he has received the *indicia* of title from the seller: See *Searle v. Keeves*, 2 Esp. 598; Langdell's Cases on Sales, 95; *Simmonds v. Humble*, 13 Com. B. N. S. 253; Langdell's Cases on Sales, 272; *Bentall v. Burn* 3 Barn. & C. 424; Langdell's Cases on Sales, 132; *Farina v. Home*, 16 Mees. & W. 119; Langdell's Cases on Sales, 180; *Marsh v. Rouse*, 44 N. Y. 643; *Bassett v. Camp*, 54 Vt. 232; *Story on Sales*, § 278 b. And compare 1 Corbin's Benjamin on Sales, § 174, n. 21; Wood on Frauds, §§ 338, 339; *Boardman v. Spooner*, 13 Allen, 353; Langdell's Cases on Sales, 610. Liability of custodian wrongfully refusing to attorn: See *Bentall v. Burn*, 3 Barn. & C. 423; Langdell's Cases on Sales, 132. Goods on third party's premises, etc.: See Langdell's Cases on Sales, 1023; *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 Hurl. & C. 722; Wood on Frauds, § 340. And compare *Shindler v. Houston* 1 Comst. 261; 49 Am. Dec. 316; Langdell's Cases on Sales, 290; *Young v. Blaisdell*, 60 Me. 272.

9 See *Chaplin v. Rogers*, 1 East, 192; Langdell's Cases on Sales, 95; *Vincent v. Germond*, 11 Johns. 283; Langdell's Cases on Sales, 284.

10 2 Schouler on Personal Property, § 474, whence preceding paragraph also derived.

11 See Wood on Frauds, § 341; note to *Shindler v. Houston*, 49 Am. Dec. 336.

12 See Langdell's Cases on Sales, 1023.

13 See *Elmore v. Stone*, 1 Taunt. 458; Langdell's Cases on Sales, 111; *Marvin v. Wallis*, 6 El. & B. 726; Langdell's Cases on Sales, 228; *Beaumont v. Brengerl*, 5 Com. B. 301; Langdell's Cases on Sales, 185; *Castle v. Sworder*, 29 Law J. Ex. 235; 30 Law J. Ex. 310; and 6 Hurl. & N. 832; Langdell's Cases on Sales, 257; *Rappleye v. Adey*, 1 Thomp. & C. 126; *Janvrin v. Maxwell*, 23 Wis. 51. Consult, also, Blackburn on Sales 28, 29; Story on Sales, § 278; *Barrett v. Goddard*, 3 Mason, 107; *Dodsley v. Varley*, 12 Ad. & E. 632; Langdell's Cases on Sales, 155; *Townley v. Crump*, 4 Ad. & E. 58; *Safford v. McDonough*, 120 Mass. 290. Basis of foregoing matter: 2 Schouler on Personal Property, §§ 471-474, and other works and essays cited in notes. And consult Bennett's Benjamin and 1 Corbin's Benjamin on Sales, §§ 172-188; Campb. on Sales, 180-195, analysing subject and discussing authorities

§ 285. *Intervention of carriers, etc. — Receipt by such agents.* A common carrier is not, ordinarily, an agent empowered to accept, but he is a suitable agent to receive on the buyer's behalf,<sup>1</sup> and to this extent his actual receipt, and also that of a warehouseman or other middleman,<sup>2</sup> will satisfy the statute;<sup>3</sup> and since acceptance might have preceded the seller's act of delivery,<sup>4</sup> an oral compliance with the statute is sometimes irrevocably fixed as soon as the carrier has received a part of the goods at the seller's hands.<sup>5</sup>

*Seller keeping control.* But delivery upon the seller's vessel, or to any carrier who really represents the seller, possibly for the purpose of securing his rights during the transit of the subject-matter, and pending payment,<sup>6</sup> is so inconsistent with the idea of putting the buyer into immediate possession, that the latter cannot be said to have received the goods either personally or through his representative.<sup>7</sup>

1 Compare *Johnson v. Cuttle*, 105 Mass. 449; 7 Am. Rep. 345; as quoted, *First Nat. Bank v. McAndrews*, 5 Mont. 325; 51 Am. Rep. 51.

2 See *Hunter v. Wright*, 12 Allen, 548.

3 See *Cusack v. Robinson*, 1 Best & Smith, 299; Langdell's Cases on Sales, 266; *Smith v. Hudson*, 4 Best & Smith, 431; Langdell's Cases on Sales, 275. And compare *Bullock v. Tschergi*, 13 Fed. Rep. 345. Consult further, Bennett's Benjamin and 1 Corbin's Benjamin on Sales, § 181.



4 Delivery to carrier: Wood on Frauds, § 342.

5 Cross v. O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721.

6 See Langdell's Cases on Sales, 1024.

7 2 Schouler on Personal Property, § 475, whence preceding paragraph also derived. So if one sells goods to be delivered by himself at a specified place, there is no change of possession nor actual receipt by the buyer until the goods arrive at such place: See *Astey v. Emery*, 4 Maule & S. 232; Langdell's Cases on Sales, 111; *Smith v. Hudson*, 6 Best & Smith, 431; Langdell's Cases on Sales, 275. And in general it has been contended that where goods, the subject of an oral contract of sale, are placed in transit on their way to the purchaser, there is no actual receipt within the statute until the transitus is at an end: Campbell on Sales, 184-186, reviewing authorities and criticising Bennett's Benjamin on Sales (2d Eng. ed.), p. 125. But compare Langdell's Cases on Sales, 1024.

### § 236. Memorandum in general. — *Provision of statute.*

The important exception concerning written compliance with the statute of frauds in relation to sales of personal property, reads in the original enactment as follows: "That some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."<sup>1</sup> This provision necessitates an act, not by the concurrence of both parties, nor by either buyer or seller in particular, but simply by the party against whom an oral enforcement of the contract is sought.<sup>2</sup>

*Distinguished from oral and written contract.* And in the oral contract itself, and that written memorandum thereof which takes the case out of the statute as to the party making and signing it, we have two distinct things which should not be confounded with one another,<sup>3</sup> nor with a complete written contract which, where it exists, is of itself a sufficient safeguard against fraud and perjury, without the aid of any memorandum.<sup>4</sup>

*Method of proof.* Though the method of interpreting a note or memorandum, which serves for written compliance with the statute of frauds, follows the leading rules as to evidence in writing, and treats the statute of frauds as not seeking to vary such rules, but as

meaning to leave the legal effect of the writing as at common law,<sup>5</sup> yet there is a marked difference between proving a contract of sale and proving compliance with the statute of frauds;<sup>6</sup> for in the latter case various questions must arise as to the sufficiency of memoranda, their mutual connection, and their bearing upon the original contract of sale.<sup>7</sup>

1 See 29 Charles II. ch. 3, § 17. But in some of the States of the Union, the requirement runs that "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby:" See statutes of New York, California, and Wisconsin, in Browne on Statute of Frauds (4th ed.), Appx. Source of paragraph: 2 Schouler on Personal Property, § 480. And see Story on Sales, § 265; Wood on Frauds, § 344. Memorandum under statute of frauds generally: See note to *McConnell v. Brillhart*, 65 Am. Dec. 668.

2 2 Schouler on Personal Property, § 481. While a contract to be binding ought to be mutual in obligations, so that neither party could sue upon it without the other, yet the statute memorandum comports with the theory that one may enforce an oral bargain against the other, though it could not be enforced against himself: 2 Schouler on Personal Property, § 483. Consult Langdell's Cases on Sales, 1032.

3 See *Marsh v. Hyde*, 3 Gray, 333; Langdell's Cases on Sales, 313.

4 See *Siewewright v. Archibald*, 17 Q. B. 103; Langdell's Cases on Sales, 452; *Parton v. Crofts*, 33 Law J. Com. P. 189; 16 Com. B. N. S. 11; Langdell's Cases on Sales, 503; *Lerned v. Wannemacher*, 9 Allen, 412; Langdell's Cases on Sales, 539; *Davis v. Shields*, 26 Wend. 341; Langdell's Cases on Sales, 558; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 573; *Williams v. Tucker*, 47 Miss. 678; 2 Schouler on Personal Property, § 482, whence paragraph derived. And consult Langdell's Cases on Sales, 1032.

5 See *Bennett's Benjamin on Sales*, § 201.

6 See citations in next note.

7 2 Schouler on Personal Property, § 483. Whereas, if the original contract itself be in writing, different memoranda, executed at subsequent times, to which both parties were not privy, could have no effect in varying its terms, but would merely evince or explain them: 2 Schouler on Personal Property, § 483; referring to *Siewewright v. Archibald*, 17 Q. B. 103; Langdell's Cases on Sales, 452. Discussion of scope of admissible parol, or extrinsic evidence in this connection: See Wood on Frauds, §§ 334-402; *Bennett's Benjamin* and 1 *Corbin's Benjamin on Sales*, §§ 202-219; *Blackburn on Sales*, p. 45; *Campbell on Sales*, §§ 196-199; 1 *Chitty on Contracts* (11th Am. ed.), 153, n. u. Delivery of note or memorandum: 2 Schouler on Personal Property, § 499; citing, *Grant v. Levan*, 4 Pa. St. 393; *Johnson v. Dodgson*, 2 Mees & W. 653; Langdell's Cases on Sales, 413; *Gibson v. Holland*, Law R. 1 Com. P. 1; Langdell's Cases on Sales, 513; *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343.

§ 287. **Form of memorandum.**—*Formal writing not requisite.* The statute requires no formal written agree-

ment of the parties,<sup>1</sup> but simply on the part of him who is to be charged, a writing which consistently imports a contract of sale.<sup>2</sup>

*Sufficient modes of expression.* And the decisions concerning the form of the memorandum show that besides the more formal shape thereof, it may be expressed by letter,<sup>3</sup> or telegram,<sup>4</sup> or acknowledgment of invoice, or bill of parcels;<sup>5</sup> that by incorporation or reference, it may be gathered from various separate writings, made at different times, which have an intelligent and consistent purpose in evincing a concluded bargain;<sup>6</sup> that it may even consist of the defendant's written proposal if supplemented by parol proof of acceptance<sup>7</sup> by the plaintiff;<sup>8</sup> and that the writing need not have been intended as a memorandum by the defendant, but may even amount to a repudiation of the oral bargain,<sup>9</sup> nor actually addressed to the plaintiff.<sup>10</sup>

1 See Langdell's Cases on Sales, 1032; Wood on Frauds, § 345

2 2 Schouler on Personal Property, § 485.

3 See Wood on Frauds, § 347. The uniform doctrine of England and the United States, that the party to be charged is the only one who needs to sign, renders this the most convenient method for drawing buyer or seller into a position where the law will hold him, especially as between bargaining parties who live at a distance from one another: See *Leather Cloth Co. v. Hieronimus*, Law R. 10 Q. B. 140; 12 Eng. Rep. 211; *Wilkinson v. Evans*, Law R. 1 Com. P. 407; Langdell's Cases on Sales, 528; *Gibson v. Holland*, Law R. 1 Com. P. 1; Langdell's Cases on Sales, 513; as cited, 2 Schouler on Personal Property, § 485.

4 See *Trevor v. Wood*, 36 N. Y. 307.

5 See *Saunderson v. Jackson*, 2 Bos. & P. 238; Langdell's Cases on Sales, 540; *Wilkinson v. Evans*, Law R. 1 Com. P. 407; Langdell's Cases on Sales, 528; *Buxton v. Rust*, Law R. 7 Ex. 1, 270; 1 Eng. Rep. 135, and 2 Eng. Rep. 675; *M'Lean v. Nicoll*, 7 Jur. N. S. 999. Langdell's Cases on Sales, 487.

6 See Langdell's Cases on Sales, 1032, 1033; *Peck v. North Staffordshire R. R. Co.* 10 H. L. Cas. 472; *M'Lean v. Nicoll*, 7 Jur. N. S. 995; Langdell's Cases on Sales, 467; *Story on Sales*, § 272. And consult *Schneider v. Norris*, 2 Maule & S. 286; Langdell's Cases on Sales, 562; *Caton v. Caton*, Law R. 2 H. L. Cas. 127; *Hinde v. Whitehouse*, 7 East, 553; Langdell's Cases on Sales, 102; *Cave v. Hastings*, Law R. 7 Q. B. D. 125; 36 Eng. Rep. 275; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Lerned v. Wannemacher*, 9 Allen, 412; Langdell's Cases on Sales, 539; *Drury v. Young*, 53 Md. 516; 42 Am. Rep. 343; *Bennett's Benjamin* and 1 Corbin's Benjamin on Sales, §§ 222-223; *Browne on Statute of Frauds*,

§§ 350-353; Wood on Frauds, § 364, et seq.; *Bill v. Bament*, 9 Mees. & W. 36; *Langdell's Cases on Sales*, 161; *Johnson v. Buck*, 6 Vroom, 344; 10 Am. Rep. 243; *Smith v. Stanton*, 15 Vt. 685; *Brown v. Whipple*, 58 N. H. 229; *Smith v. Jones*, 66 Ga. 339; 42 Am. Rep. 72; *North v. Mendel*, 73 Ga. 400; 54 Am. Rep. 879, 881; *Beckwith v. Talbot*, 95 U. S. 289. Only reference to price in unsigned postscript: *Doughty v. Manhattan Brass Co.* 4 N. E. Rep. (N. Y.) 747.

7 See Wood on Frauds, § 378.

8 See *Himrod Furnace Co. v. Cleveland etc. R. R. Co.* 22 Ohio St. 451; *Reuss v. Picksley*, Law R. 1 Ex. 342; *Sanborn v. Flagler*, 9 Allen, 474; *Langdell's Cases on Sales*, 604; *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 432. Form of mutual agreement, duplicates, etc.. See *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576; *Lerned v. Wannemacher*, 9 Allen, 442; *Langdell's Cases on Sales*, 599.

9 See Wood on Frauds, § 360. The latest cases on this point side more strongly than formerly with the plaintiff, who seeks the remedy on the basis of such admission or recognition of the bargain by the defendant: See *Bailey v. Sweeting*, 9 Com. B. N. S. 843; *Langdell's Cases on Sales*, 480; *Story on Sales*, § 272 a; *Wilkinson v. Evans*, Law R. 1 Com. P. 457; *Langdell's Cases on Sales*, 528; *Buxton v. Rust*, Law R. 7 Ex. 1, 279; 1 Eng. Rep. 155, and 2 Eng. Rep. 675; *Leather Cloth Co. v. Hieronimus*, Law R. 10 Q. B. 140; 2 Eng. Rep. 211. And compare these cases with *Richards v. Porter*, 6 Barn. & C. 457; *Langdell's Cases on Sales*, 383 (1827); and *Smith v. Surman*, 9 Barn. & C. 561; *Langdell's Cases on Sales*, 54 (1825). Consult, also, *Ellis v. Deadman*, 4 Rob. 467; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576.

10 See Wood on Frauds, § 347; *Gibson v. Holland*, Law R. 1 Com. P. 1; *Langdell's Cases on Sales*, 513; citing, *Sugden on Vendors and Purchasers* (14th Eng. ed.), 139, § 39; also, *Townsend v. Hargraves*, 118 Mass. 355; *Argus Co. v. Albany*, 55 N. Y. 455; *Peabody v. Speyers*, 56 N. Y. 230; *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343; *Johnson v. Dodgson*, 2 Mees & W. 653; *Langdell's Cases on Sales*, 413. Basis of most of foregoing matter: 2 *Schouler on Personal Property*, §§ 485-489. And consult *Campbell on Sales*, 199, 207.

§ 283. Contents of memorandum.—*In general.* In order to constitute a sufficient memorandum of the bargain under the statute, it should identify the parties to the sale, and contain the essential terms and subject-matter of the oral contract.<sup>1</sup>

*Designation of parties.* And the principle to be gathered from the decisions concerning the sufficiency of the designation of the parties to the contract appears to be, that the buyer and seller must, upon reference to the memorandum, and consideration not merely of literal expressions, but also of the context and the general character of the writing, be distinguishable as bearing that mutual relation, each being indicated in his own capacity.<sup>2</sup>

*Price.* So in regard to the consideration of the contract,<sup>3</sup> the present rule seems to be, that if the oral contract of sale expressly fixed a specific price, and the parties did not depend upon the legal determination of an implied or reasonable one, that definite price must appear on the face of the memorandum or writings connected therewith, as an essential part of the bargain;<sup>4</sup> and that while parol evidence cannot be introduced for the purpose of supplying a fixed price to complete the memorandum, yet resort can be had to such evidence in order to show that there was a price fixed, which ought to have appeared in the memorandum, to make it available as a means of enforcing the bargain.<sup>5</sup>

*Essential terms of bargain.* All the terms of the bargain which are substantial, material, or essential, must appear in the memorandum,<sup>6</sup> although it need not show, besides the main points of the contract, each particular incident of the bargain, nor the implied terms thereof.<sup>7</sup>

*Stipulations.* But the rule that the enforcing party's stipulations may be omitted from the memorandum, seems to apply only to the case of stipulations on either side which are decidedly special and unusual;<sup>8</sup> and in the courts of this country fatal insufficiency has been considered to result from such omissions from the memorandum as a stipulated term of credit, a fixed date of performance, a condition that the party defendant should first approve the quality, or even an express warranty of the quality of the goods.<sup>9</sup>

*Time and place of delivery.* It is not essential to the validity of a contract of sale of goods, that it should specify time or place of delivery;<sup>10</sup> but if there be a time and place agreed upon, and the memorandum does not specify it, the plaintiff testifying to such terms cannot recover upon the contract.<sup>11</sup>

1 2 Schouler on Personal Property, § 440. And see Wood on Frauds, § 345; Langdell's Cases on Sales, 1033. Insufficient memorandum: *North v. Mendel*, 73 Ga. 400; 54 Am. Rep. 879, 882.

2 See *Allen v. Bennett*, 3 Taunt. 169; Langdell's Cases on Sales, 350; *Champion v. Plummer*, 3 Bos. & P. 252; Langdell's Cases on Sales, 343; *Sarl v. Bourdillon*, 1 Com. B. N. S. 188; Langdell's Cases on Sales, 472; *Vandenburgh v. Spooner*, Law R. 1 Ex. 316; Langdell's Cases on Sales, 531; *Newell v. Radford*, Law R. 3 Com. P. 52; Langdell's Cases on Sales, 534; *Harvey v. Stevens*, 43 Vt. 653; *Brown v. Whipple*, 53 N. H. 229; *Sanborn v. Flagler*, 9 Allen, 476; Langdell's Cases on Sales, 604; *Coddington v. Goddard*, 16 Gray, 433; Langdell's Cases on Sales, 614; *Bailey v. Ogden*, 3 Johns. 393; 3 Am. Dec. 509; Langdell's Cases on Sales, 588, n. 1; *Calkins v. Falk*, 1 Abb. N. Y. App. 291; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446; 8 Fed. Dec. 692; Langdell's Cases on Sales, 583; Wood on Frauds, §§ 354, 359; Bennett's Benjamin on Sales, §§ 234-237; 1 Corbin's Benjamin on Sales, §§ 233-236, and notes; citing, also, *Grafton v. Cummings*, 99 U. S. 101, 107; *Coate v. Terry*, 24 Up. Can. C. P. 571.

3 See *Wain v. Warlters*, 5 East, 10; Bennett's Benjamin on Sales, §§ 232, 233; note to *McConnell v. Brillhart*, 65 Am. Dec. 663; Story on Sales, § 270, p. 263, n. 3.

4 See citations in next note. When price must be stated: Wood on Frauds, § 351.

5 See *Acebal v. Levy*, 10 Bing. 376; Langdell's Cases on Sales, 399; *Hoadly v. McLaine*, 10 Bing. 582; Langdell's Cases on Sales, 405; *Elmore v. Kingscote*, 5 Barn. & C. 383; Langdell's Cases on Sales, 373; *Goodman v. Griffiths*, 1 Hurl. & N. 574; Langdell's Cases on Sales, 473; *Ashcroft v. Marrin*, 4 Man. & G. 450; Langdell's Cases on Sales, 440. Consult Story on Sales, §§ 222, 270; Bennett's Benjamin on Sales, § 249; 1 Corbin's Benjamin on Sales, § 251, n. 46; Browne on Statute of Frauds, §§ 376, 387-408; Wood on Frauds, § 391. Sufficiency of statement of price: *Owen v. Klous*, 101 Mass. 449; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446; 8 Fed. Dec. 692; Langdell's Cases on Sales, 533. But compare *James v. Muir*, 33 Mich. 223. And see *Williams v. Robinson*, 73 Me. 196; 40 Am. Rep. 352. Only reference to price in unsigned postscript: *Doughty v. Manhattan Brass Co.* 4 N. E. Rep. (N. Y.) 747.

6 See Wood on Frauds, § 370.

7 See 2 Schouler on Personal Property, § 492; citing, *Pitts v. Beckett*, 13 Mees. & W. 743; Langdell's Cases on Sales, 443. The memorandum must not falsify by showing a bargain different in essence from that orally entered into; it must not be made up of contradictory statements; and it must, on the whole, import a bargain: 2 Schouler on Personal Property, § 492; referring to *M'Lean v. Nicholl*, 7 Jur. N. S. 939; Langdell's Cases on Sales, 437; *Cooper v. Smith*, 15 East, 103; Langdell's Cases on Sales, 355; *Smith v. Surman*, 9 Barn. & C. 551; Langdell's Cases on Sales, 54; *Goodman v. Griffiths*, 1 Hurl. & N. 574; Langdell's Cases on Sales, 478. But compare *Williams v. Bacon*, 2 Gray, 387; Langdell's Cases on Sales, 594. Party offering memorandum cannot discredit it by showing that it does not contain essential terms: See *M'Mullen v. Helberg*, 4 Law R. Ir. 64; 6 Law R. Ir. 463; *Remick v. Sandford*, 118 Mass. 102.

8 See *Sarl v. Bourdillon*, 1 Com. B. N. S. 188; Langdell's Cases on Sales, 472. And compare *Egerton v. Matthews*, 6 East, 307; Langdell's Cases on Sales, 342. It is not necessary that the note or memorandum should state independent and collateral stipulations which formed no part of the sale: *Coddington v. Goddard*, 16 Gray, 436, 443; Langdell's Cases on Sales, 614.

9 See *Davis v. Shields*, 26 Wend. 346; *Langdell's Cases on Sales*, 553; *Boardman v. Spooner*, 13 Allen, 353; *Langdell's Cases on Sales*, 610; *Buck v. Pickwell*, 27 Vt. 157; *Elfe v. Gadsden*, 2 Rich. 373; *Soles v. Hickman*, 20 Pa. St. 130; *O'Donnell v. Leeman*, 43 Me. 153; *Peltier v. Collins*, 3 Wend. 450; 23 Am. Dec. 711; *Langdell's Cases on Sales*, 548; *Story on Sales*, § 271; 2 *Schouler on Personal Property*, § 492, whence paragraph derived. Contents of sufficient memorandum discussed: *Campbell on Sales*, 207-215; *Bennett's Benjamin and Corbin's Benjamin on Sales*, §§ 232-234, and notes; 2 *Schouler on Personal Property*, §§ 400-403, upon which foregoing matter based.

10 *Smith v. Snell*, 82 Mo. 215; 52 Am. Rep. 365.

11 *Smith v. Snell*, 82 Mo. 215; 52 Am. Rep. 555. And see *Browne on Statute of Frauds*, § 364.

§ 280. *Parol evidence concerning memorandum.*—*General rule against.* The general rule is, that the writing or writings resorted to as a memorandum must, in order to satisfy the statute, so substantially express the bargain as to enable the court to make out what it was, without resorting to parol evidence.<sup>1</sup>

*To show that writing states bargain.* But where the sufficiency of the memorandum is at issue, it is competent to show by parol evidence whether or not the writing offered correctly states the material terms of the oral contract,<sup>2</sup> though such evidence cannot be adduced to aid or vary those written terms.<sup>3</sup>

*Extraneous evidence of trade usage.* And the prevailing tendency, with regard alike to the parties, the essential terms, the subject-matter of the bargain, and the fact that a sale is constituted, is to admit extraneous evidence of trade usage,<sup>4</sup> in furtherance of the true meaning of the parties, wherever the memorandum furnishes a terse statement of the transaction, such as is usual in mercantile contracts.<sup>5</sup>

*Removal of ambiguity.* So even surrounding circumstances have been admitted in evidence for the purpose of identifying the subject-matter or explaining some technical expression contained in the memorandum, and in general for removing an ambiguity upon its face.\*

1 See *Brown v. Whipple*, 58 N. H. 229; *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 462; *Eggleson v. Wagner*, 46 Mich. 610; *Story on Sales*, § 269; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, § 210; *Campbell on Sales*, 136; 2 Kent Com. 511.

2 See citations in next note.

3 See *Langdell's Cases on Sales*, 1032; *Pitts v. Beckett*, 13 Mees. & W. 743; *Langdell's Cases on Sales*, 443; *Acebal v. Levy*, 10 Bing. 376; *Langdell's Cases on Sales*, 399; *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614; *Wood on Frauds*, § 390.

4 See *Wood on Frauds*, § 397.

5 See *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446; 8 Fed. Dec. 652; *Langdell's Cases on Sales*, 533; *Newell v. Radford*, Law R. 3 Com. P. 52; *Langdell's Cases on Sales*, 534; *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614.

6 See *Spicer v. Cooper*, 1 Q. B. 424; *Miller v. Stevens*, 100 Mass. 513; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; also, *Macdonald v. Longbottom*, 1 El. & E. 977; *Johnson v. Raylton*, Law R. 7 Q. B. D. 438; *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343. Source of foregoing matter: 2 *Schouler on Personal Property*, § 403. And consult further, *Bennett's Benjamin on Sales*, §§ 213-215; 1 *Corbin's Benjamin on Sales*, §§ 211-213; *Story on Sales*, § 269; *Wood on Frauds*, § 393.

§ 290. *Modification of original bargain. — Showing subsequent oral agreement.* In regard to an oral agreement, subsequent to the written memorandum, the doctrine of Massachusetts and some other States appears to be, that the writing is not conclusive, but that any subsequent oral agreement may enlarge the time of performance or vary other terms of the contract, or show its waiver and discharge altogether.<sup>1</sup>

*Exclusive of such agreement.* But the doctrine of the late English cases, which has been deemed the better opinion, is that a written memorandum which falls within the statute of frauds, cannot be varied by any subsequent agreement which is not expressed in writing;<sup>2</sup> and that parol evidence is inadmissible to show a change in the time or place of delivery, or other modification of the original bargain.<sup>3</sup>

*Rescission of prior contract.* It is also decided in England that where the parties enter into a new oral agreement, whose effect would be incidentally to rescind the previous written contract by essentially modifying its



terms, the modification is inoperative as a rescission of the written contract, and does not prevent its enforcement;<sup>4</sup> though it is as yet unsettled whether a complete abandonment and rescission of the contract might not appear by oral testimony.<sup>5</sup>

1 *Cummings v. Arnold*, 3 Met. 486; *Langdell's Cases on Sales*, 575; *Stearns v. Hill*, 9 Cush. 31. And see *Whittier v. Dana*, 10 Allen, 326; *Langdell's Cases on Sales*, 608; *Kribs v. Jones*, 44 Md. 396; also, *Richardson v. Cooper*, 25 Me. 450; *Negley v. Jeffers*, 28 Ohio St. 90; *Browne on Statute of Frauds*, §§ 400-428. This view follows the common-law rule, which permits the oral variance of a written contract not under seal: See *Goss v. Lord Nugent*, 5 Barn. & Adol. 65.

2 See citations in next note.

3 See *Stead v. Dawber*, 10 Ad. & E. 57; *Langdell's Cases on Sales*, 418; *Marshall v. Lynn*, 6 Mees. & W. 100; *Langdell's Cases on Sales*, 429; *Noble v. Ward*, Law R. 1 Ex. 117; Law R. 2 Ex. 135; *Langdell's Cases on Sales*, 502. *Contra*, *Cuff v. Penn*, 1 Maule & S. 21; *Langdell's Cases on Sales*, 358; *Leather Cloth Co. v. Hieronimus*, Law R. 10 Q. B. 140; 12 Eng. Rep. 211. And consult *Swain v. Semens*, 9 Wall. 272; *Dana v. Hancock*, 30 Vt. 616.

4 *Noble v. Ward*, Law R. 1 Ex. 117; Law R. 2 Ex. 135; *Langdell's Cases on Sales*, 520; *Moore v. Campbell*, 10 Ex. 323; *Langdell's Cases on Sales*, 461. And see *Ogle v. Earl Vane*, Law R. 2 Q. B. 275; Law R. 3 Q. B. 272; *Stewart v. Eddowes*, Law R. 9 Com. P. 397.

5 *Bennett's Benjamin* and 1 *Corbin's Benjamin* on Sales, § 212; *Browne on Statute of Frauds*, §§ 409-428. Source of foregoing matter: 2 *Schouler on Personal Property*, § 495. Consult, also, *Bennett's Benjamin* on Sales, §§ 216-218; 1 *Corbin's Benjamin* on Sales, §§ 214-218; *Langdell's Cases on Sales*, 1033; *Wood on Frauds*, § 403.

§ 291. **Signature to memorandum.**—*Place of signing or subscribing.* The party to be charged, as distinguished from the party electing to enforce the contract,<sup>1</sup> must place his name in some part of the instrument,<sup>2</sup> which may be either at the top or the bottom, or in the body of the instrument,<sup>3</sup> where the statute requires "signing,"<sup>4</sup> but must be at the end of the memorandum where, as in some States, the statute departs from the usual phraseology and requires the writing to be "subscribed" instead of "signed."<sup>5</sup>

*Mode of signing.* The signature may be in lead-pencil instead of ink,<sup>6</sup> or by printing or stamping, if the circumstances are such as to give it a significance beyond that of an unused blank, and really equivalent to a

memorandum in actual use with the name as part of it;<sup>7</sup> it may be<sup>8</sup> by mark<sup>9</sup> or by initials;<sup>10</sup> it may be by the party to be charged himself, or by another, if *bona fide*, and the authorized signature of such party to the memorandum;<sup>11</sup> but whatever the mode or place of the signature, it must have been intended as such, and not<sup>12</sup> to serve merely by way of personal description.<sup>13</sup>

*Connected papers.* Since the written memorandum may be made up of two or more papers which bear a mutual relation, a signature may suffice if it governs the whole by suitable reference, though it is actually placed only upon one of the papers;<sup>14</sup> but it would appear from the English decisions that the reference to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, and not the reverse.<sup>15</sup> Where a contract was made up of letters, and the only reference to price was contained in an unsigned postscript to a letter, in answer to which an order was sent, which was acknowledged as "booked," it was held that all the letters were so connected by their contents as together to constitute a valid contract, and avoid the statute of frauds.<sup>16</sup>

1 See *Allen v. Bennett*, 3 Taunt. 169; *Langdell's Cases on Sales*, 350; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, § 255; *Story on Sales*, § 266; *Blackburn on Sales*, § 60; *Campbell on Sales*, 215; *Wood on Frauds*, § 405.

2 2 Schouler on Personal Property, § 497, whence paragraph derived. And see *Wood on Frauds*, § 415.

3 See *Wood on Frauds*, § 416.

4 See *Johnson v. Dodgson*, 2 Mees. & W. 653; *Langdell's Cases on Sales*, 413; *Allen v. Bennett*, 3 Taunt. 169; *Langdell's Cases on Sales*, 350; *Harvey v. Stevens*, 43 Vt. 653; *Coddington v. Goddard*, 16 Gray, 411; *Langdell's Cases on Sales*, 614; *Clason v. Bailey*, 14 Johns. 484; *Langdell's Cases on Sales*, 541; *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343; *Browne on Statute of Frauds*, §§ 355, 358.

5 See *Browne on Statute of Frauds* (4th ed.), Appx.; *Davis v. Shields*, 26 Wend. 341; *Langdell's Cases on Sales*, 558.

6 See *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286; *Langdell's Cases on Sales*, 537; *Clason v. Bailey*, 14 Johns. 484; *Langdell's Cases on Sales*, 541; *Geary v. Physic*, 5 Barn. & C. 234; *Wood on Frauds*, § 412.

7 See *Schneider v. Norris*, 2 Maule & S. 286; *Langdell's Cases on Sales*, 362; *Wood on Frauds*, § 412. And compare *Hawkins v. Chace*, 19 Pick. 502; *Langdell's Cases on Sales*, 554.

8 See *Wood on Frauds*, § 413.

9 2 Kent Com. 511; *Bickley v. Keenan*, 60 Ala. 293.

10 See *Phillimore v. Barry*, 1 Camp. 513; *Langdell's Cases on Sales*, 346; *Caton v. Caton*, Law R. 2 H. L. 127; stated, *Wood on Frauds*, § 419.

11 2 Kent Com. 511; *Helshaw v. Langley*, 11 Law J. Ch. 17. Signature by agent: *Wood on Frauds*, § 407.

12 See *Wood on Frauds*, § 409.

13 See *Selby v. Selby*, 3 Mer. 2; 2 *Schouler on Personal Property*, § 437, whence paragraph mainly derived. Consult further concerning signature, *Wood on Frauds*, § 405-419; *Langdell's Cases on Sales*, 1034; *Bennett's Benjamin on Sales*, §§ 255-264 *a*; 1 *Corbin's Benjamin on Sales*, §§ 255-264; *Story on Sales*, § 266; *Campbell on Sales*, §§ 216-221, stating that a telegram sent in the ordinary way is sufficiently signed according to the statute of frauds, as held in *Godwin v. Francis*. Law R. 5 Com. P. 295.

14 See *Buxton v. Rust*, Law R. 7 Ex. 1, 279; 1 Eng. Rep. 135, and 2 Eng. Rep. 675; *Brown v. Whipple*, 58 N. H. 229; *Morton v. Dean*, 13 Met. 335; *Browne on Statute of Frauds*, §§ 346-348, 371-376.

15 See *Caton v. Caton*, Law R. 2 H. L. Cas. 127; as cited *Bennett's Benjamin on Sales*, § 264; and stated, *Wood on Frauds*, § 419. Basis of paragraph: 2 *Schouler on Personal Property*, § 498.

16 *Doughty v. Manhattan Brass Co.* 4 N. E. Rep. (N. Y.) 747; affirming, 31 Hun, 315, *mem.* But it was declared that if the letter with the postscript stood alone, as containing the contract, it would be necessary to hold that it was not subscribed within the intent of the statute: *Doughty v. Manhattan Brass Co.* 4 N. E. Rep. 747; 101 N. Y. 644; referring to *James v. Patten*, 6 N. Y. 44.

§ 292. *Compliance by agents.—In general.* Compliance by an agent as legally representing his principal would appear to be justified even where, as in some of the United States, the local enactment makes no special mention of agents,<sup>1</sup> as well as under the express provision of the statute,<sup>2</sup> that the written memorandum may be signed, not only by the parties to be charged, but likewise by "their agents thereunto lawfully authorized."<sup>3</sup>

*Authority of agent.* It is not necessary that there should be an appointment in writing,<sup>4</sup> nor need the authority have been previously conferred, if the agent's act be subsequently ratified;<sup>5</sup> nor need the authority be specially conferred at all, but it is deducible from the

course of the agent's employment, as particularly illustrated in the case of brokers and auctioneers.<sup>6</sup>

*Agent's capacity, etc.* A memorandum may be signed by or on behalf of both seller and buyer;<sup>7</sup> and though a person should sign in his own name, such signature may be binding if he is mutually understood to sign as agent for one of the contracting parties;<sup>8</sup> but one whose employment is essentially on behalf of the seller will not readily be supposed to have authority to bind the buyer likewise by a written memorandum;<sup>9</sup> nor in general is it enough that the third party is lawfully authorized to sign, but he must sign in the capacity of agent, as may be shown by parol evidence.<sup>10</sup>

*Auctioneer's memorandum.* While an auctioneer, whose authority to bind the parties is founded on the method of conducting a public sale, is the seller's agent throughout, he is the buyer's agent only from the fall of the hammer, and for a memorandum made contemporaneous with the acceptance of the bid. and unless his conduct repels the inference of his agency for the buyer for such purpose.<sup>11</sup>

1 See Browne on Statute of Frauds (4th ed.), Appx.

2 See 29 Charles II. ch. 3, § 17.

3 2 Schouler on Personal Property, § 500. And consult Wood on Frauds, § 425.

4 See Wood on Frauds, § 420. So as to original authority to buy or sell: See *Soames v. Spencer*, Dowl. & R. 32; *Langdell's Cases on Sales*, 368; *Sanborn v. Flagler*, 9 Allen, 474; *Langdell's Cases on Sales*, 601; *Merritt v. Clason*, 52 Johns. 102; 7 Am. Dec. 286; *Langdell's Cases on Sales*, 537.

5 See *Newton v. Bronsen*, 3 Kern. 587; *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286; *Langdell's Cases on Sales*, 537; *Bennett's Benjamin on Sales*, § 265; *Story on Sales*, § 267; *Wood on Frauds*, § 426. Revocation of authority: See *Heyman v. Neale*, 2 Camp. 337; *Langdell's Cases on Sales*, 348; *Williams v. Bacon*, 2 Gray, 387; *Langdell's Cases on Sales*, 594.

6 2 Schouler on Personal Property, § 500, whence paragraph mainly derived. And consult *Langdell's Cases on Sales*, 1034. Limited or general authority, and delegation of authority: See *Pitts v. Beckett*, 13 Mees. & W. 743; *Langdell's Cases on Sales*, 443; *Henderson v. Barnewall*, 1 Younge & J. 387; *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614; *Peirce v. Corf*, Law R. 9 Q. B. 210; 8 Eng. Rep. 316; *Browne on Statute of Frauds*, § 370.

7 The agent must be agent of both, or neither will be bound : See *Smith v. Neefus*, 53 Barb. 63.

8 *Wiener v. Whipple*, 53 Wis. 298 ; 40 Am. Rep. 775.

9 See *Graham v. Fretwell*, 3 Man. & G. 368 ; *Langdell's Cases on Sales*, 433 ; *Graham v. Musson*, 5 Bing. N. C. 603 ; *Langdell's Cases on Sales*, 425 ; *Murphy v. Boese*, Law R. 10 Ex. 126 ; 12 Eng. Rep. 537. But compare *Durrell v. Evans*, 1 Hurl. & C. 174 ; *Langdell's Cases on Sales*, 494.

10 See *Gosbell v. Archer*, 2 Ad. & E. 500 ; *Trueman v. Loder*, 11 Ad. & E. 539 ; *Kenworthy v. Schofield*, 2 Barn. & C. 945 ; *Langdell's Cases on Sales*, 373 ; *Sanborn v. Flagler*, 9 Allen, 474 ; *Langdell's Cases on Sales*, 604 ; *Williams v. Bacon*, 2 Gray, 387 ; *Langdell's Cases on Sales*, 594 ; *Baldwin v. Bank of Newbury*, 1 Vall. 234. Place of signature or use of lead-pencil instead of ink, immaterial : See *Merritt v. Clason*, 12 Johns. 162 ; 7 Am. Dec. 286 ; *Langdell's Cases on Sales*, 527. Signature by telegraph clerk or operator sufficient where draft message not left at office : See *Godwin v. Francis*, Law R. 5 Com. P. 255 ; *Trevor v. Wood*, 36 N. Y. 307 ; *Wood on Frauds*, § 428 ; referring, also, to *McBlain v. Cross*, 25 L. T. N. S. 804. Charging party himself as agent ; agency for undisclosed principal : See *Wright v. Darmah*, 2 Camp. 203 ; *Langdell's Cases on Sales*, 348 ; *Farebrother v. Simmons*, 5 Barn. & Ald. 333 ; *Langdell's Cases on Sales*, 370 ; *Shurman v. Brandt*, Law R. 6 Q. B. 720 ; *Higgins v. Senior*, 8 Mees. & W. 834 ; also, *Sanborn v. Flagler*, 9 Allen, 477 ; *Langdell's Cases on Sales*, 604 ; *Wiener v. Whipple*, 53 Wis. 298 ; 40 Am. Rep. 775. Unadopted modifications : *Pitts v. Beckett*, 13 Mees. & W. 743 ; *Langdell's Cases on Sales*, 433. Signing for non-existing or non-authorizing principal : See *Kelner v. Baxter*, Law R. 2 Com. P. 174. Basis of foregoing matter : 2 *Schouler on Personal Property*, §§ 500-504. Consult further, *Blackburn on Sales*, p. 77 ; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, §§ 265-272 ; *Campbell on Sales*, 221, 222 ; *Story on Sales*, §§ 267-268 ; *Wood on Frauds*, § 425 ; *Langdell's Cases on Sales*, 1034.

11 See *Mews v. Carr*, 1 Hurl. & N. 484 ; *Langdell's Cases on Sales*, 475 ; *Hinde v. Whitehouse*, 7 East, 558 ; *Langdell's Cases on Sales*, 102 ; *Bartlett v. Purnell*, 4 Ad. & E. 792 ; *Johnson v. Buck*, 6 Vroom, 338 ; 10 Am. Rep. 243 ; *Burke v. Haley*, 2 Gilm. 614 ; *Horton v. McCarty*, 53 Me. 394. Entries on auctioneer's memorandum book, by auctioneer or his clerk, of terms, conditions, and stipulations of sale : See *Bird v. Boulter*, 2 Barn. & Adol. 443 ; *Langdell's Cases on Sales*, 395 ; *Peirce v. Corf*, Law R. 9 Q. B. 210 ; 8 Eng. Rep. 316 ; *Henderson v. Barnewall*, 1 Younge & J. 387 ; *Langdell's Cases on Sales*, 384 ; *Hinde v. Whitehouse*, 7 East, 558 ; *Langdell's Cases on Sales*, 102 ; *Alna v. Plummer*, 4 Me. 258 ; *Harvey v. Stevens*, 43 Vt. 653 ; *Morton v. Dean*, 13 Met. 385 ; *Coles v. Bowne*, 10 Paige, 526 ; *Johnson v. Buck*, 6 Vroom, 338 ; 10 Am. Rep. 243 ; *Cathcart v. Keirnaghan*, 5 Strob. 120 ; *Norris v. Blair*, 39 Ind. 90. Stealthy separate entries on strictly private book : See *Peirce v. Corf*, Law R. 9 Q. B. 210 ; 8 Eng. Rep. 316 ; *Baltzen v. Nicolay*, 53 N. Y. 467. Basis of paragraph : 2 *Schouler on Personal Property*, § 506. And see *Blackburn on Sales*, p. 78 ; *Bennett's Benjamin and 1 Corbin's Benjamin on Sales*, §§ 268-270 ; *Campbell on Sales*, 223, 224 ; *Browne on Statute of Frauds* (4th ed.), Appx. ; *Langdell's Cases on Sales*, 1034 ; *Wood on Frauds*, §§ 422-424, 427.

§ 293. **Broker's memorandum.**—*For both parties.* Brokers, so far as their business brings them into mutual relation with buyer and seller, are agents for both parties,<sup>1</sup> duly empowered by virtue of their employ-

ment to make a sufficient memorandum which shall bind each principal.<sup>2</sup>

*For one party.* But there are cases in which a broker has been treated, with corresponding restriction upon his authority to sign, as broker for one party and not for the other,<sup>3</sup> and the extent of the rights and liabilities of brokers must still be influenced, in some respects by local usage.<sup>4</sup>

*Memorandum book.* Thus brokers in most parts of the United States keep a memorandum book in which they make briefly expressed entries of each sale transaction,<sup>5</sup> which as a mode of compliance with the statute of frauds are quite favorably regarded<sup>6</sup> by the courts of this country,<sup>7</sup> however concise they may be, if they do not materially vary, by way of omission or otherwise, from the oral contract.<sup>8</sup>

*Bought and sold notes, etc.* But in England most of the decisions have turned upon rules and regulations made imperative by statutes which, until 1870, and particularly with reference to brokers in London, required each broker not only to give bond and keep a memorandum book, but also to deliver, upon request, a contract note to both buyer and seller.<sup>9</sup> In the same connection have arisen numerous disputes as to the legal effect of "bought and sold notes" of various kinds,<sup>10</sup> named for their initial words, and with which the contract notes may or may not be classed, but which, instead of professing to be an exact transcript of the broker's memorandum, were rather in most cases corresponding written expressions of the bargain, to suit the convenience of the respective parties.<sup>11</sup>

1 See Wood on Frauds, § 429.

2 See *Heyman v. Neale*, 2 Camp. 337; *Fowler v. Hollins*, Law R. 7 Q. B. 616; *Langdell's Cases on Sales*, 348; 3 Eng. Rep. 232; affirmed, Law R. 7 H. L. 757; 14 Eng. Rep. 138; *Hinckley v. Arey*, 27 Me. 362; *Coddington v. Goddard*, 16 Gray, 442; *Langdell's Cases on Sales*, 614; *Clason v. Bailey*, 14 Johns. 484; *Langdell's Cases on Sales*, 541; *Story*

on Agency, § 23. Broker contracting without a principal: *Shurman v. Brandt*, Law R. 6 Q. B. 720. And compare *Humfrey v. Dale*, 7 El. & B. 266; *Fleet v. Murton*, Law R. 7 Q. B. 127; 1 Eng. Rep. 32; *Mollett v. Robinson*, Law R. 5 Com. P. 648; Law R. 7 Com. P. 84; 1 Eng. Rep. 335.

3 See *Moore v. Campbell*, 10 Ex. 323; *Langdell's Cases on Sales*, 465; *M'Mullen v. Helberg*, 4 Law R. Ir. 94; *Davis v. Shields*, 26 Wend. 341; *Langdell's Cases on Sales*, 558; *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614.

4 2 Schouler on Personal Property, § 507, whence preceding paragraph also derived. And see *Campbell on Sales*, 925.

5 See citations in succeeding note.

6 See *Wood on Frauds*, § 430.

7 Divergence between English and American view of broker's books discussed: *Langdell's Cases on Sales*, 1035.

8 See *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614; *Boardman v. Spooner*, 13 Allen, 353; *Langdell's Cases on Sales*, 610; *Hinckley v. Arey*, 27 Me. 362; *Clason v. Bailey*, 14 Johns. 484; *Langdell's Cases on Sales*, 541.

9 See citations in succeeding notes.

10 See discussion in *Langdell's Cases on Sales*, 1035.

11 2 Schouler on Personal Property, § 507, whence section mainly derived. The real terms of the bargain were manifest, if the bought and sold notes or contract notes and broker's memorandum all corresponded, and did not differ essentially from one another: 2 Schouler on Personal Property, § 507. See result of English authorities concerning variance, in such cases summarized in *Bennett's Benjamin on Sales*, §§ 294-302; quoted, *Wood on Frauds*, § 430; citing, *Heyman v. Neale*, 2 Camp. 377; *Langdell's Cases on Sales*, 343; *Hodgson v. Davis*, 2 Camp. 531; *Bold v. Rayner*, 1 Mees. & W. 342; *Thornton v. Charles*, 9 Mees. & W. 802; *Langdell's Cases on Sales*, 436; *Hawes v. Forster*, 1 Moody & R. 363; *Langdell's Cases on Sales*, 410; *Parton v. Crofts*, 16 Com. B. N. S. 11; *Langdell's Cases on Sales*, 508; *Heyworth v. Knight*, 17 Com. B. N. S. 298; *Gregson v. Rucks*, 4 Q. B. 747; *Sievewright v. Archibald*, 17 Q. B. 115; *Langdell's Cases on Sales*, 452; *Thompson v. Gardner*, Law R. 1 C. P. D. 777; 18 Eng. Rep. 328; *Thornton v. Kempster*, 5 Taunt. 736; *Langdell's Cases on Sales*, 364; *Maclean v. Dunn*, 4 Bing. 722; *Langdell's Cases on Sales*, 300; *Kempson v. Boyle*, 3 Hurl. & C. 763; *Radford v. Newell*, Law R. 3 Com. P. 52. Consult, also, *Blackburn on Sales*, 88, 89, et seq.; *Campbell on Sales*, 427-438; *Story on Sales*, § 269; *Wood on Frauds*, §§ 430-434, 436. Bought and sold notes in this country: See *Coddington v. Goddard*, 16 Gray, 436; *Langdell's Cases on Sales*, 614; *Davis v. Shields*, 26 Wend. 341; *Langdell's Cases on Sales*, 558; *Suydam v. Clark*, 2 Sand. 133; *Langdell's Cases on Sales*, 581; *Butler v. Thompson*, 11 Blatchf. 533; 92 U. S. 412; *Newberry v. Wall*, 65 N. Y. 484; 84 N. Y. 576.

## CHAPTER XXI.

### CONDITIONAL SALES.

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- § 312. Sale by sample or description.
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§ 294. **Conditions in general.**—*Nature and kinds.* A condition is a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation.<sup>1</sup> Conditions may be precedent, concurrent, or subsequent.<sup>2</sup>

*Condition precedent.* A condition precedent,<sup>3</sup> is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.<sup>4</sup>

*Conditions concurrent.* Conditions concurrent<sup>5</sup> are those which are mutually dependent,<sup>6</sup> and are to be performed at the same time.<sup>7</sup>



*Condition subsequent.* A condition subsequent<sup>8</sup> is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.<sup>9</sup>

*Illustrations.* A contract which provides for subjection of an article to trial, and becomes absolute only on approval, creates a condition which must be satisfied before the promise it qualifies becomes effectual, and which is therefore a condition precedent, so that the title will not pass until the option is determined.<sup>10</sup>

*Performance, etc.* Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except in cases of timely and unretracted notice by such other party that he will not perform.<sup>11</sup>

1 1 Bouvier Law Dict. tit. Condition (14th ed.), 312, defining the various classes of conditions. And consult 1 Abbott's Law Dict. 260. An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event: Cal. Civ. Code, § 1434. Conditions in contract discussed: 2 Schouler on Personal Property, §§ 277-284; 1 Wharton on Contracts, §§ 545-617.

2 Cal. Civ. Code, § 1435. And see succeeding subdivisions of section.

3 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345.

4 Cal. Civ. Code, § 1436. And compare 1 Bouvier Law Dict. tit. Conditions (14th ed.), 313; Story on Sales, § 247. Consult, also, Winfield's Words etc.; citing, *Redman v. Aetna Ins. Co.* 49 Wis. 438; *Moore v. Moore*, 47 Barb. 262; *Selden v. Pringle*, 17 Barb. 466; *Ludlow v. N. Y. & H. R. R. Co.* 12 Barb. 442. Where there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of the possession: *State v. O'Neil*, 58 Vt. 140, 159; 2 Atl. Rep. 586, 589. And where goods are sent C. O. D. the title does not pass until they are accepted and paid for: *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 557; referring to *People v. Shriver*, 31 Alb. L. J. 163; 23 Fed. Rep. 134.

5 See *Fishback v. Van Dusen*, 33 Minn. 111, 116.

6 Dependent and independent stipulations in contracts discussed: 2 Schouler on Personal Property, §§ 278, 279. And see 2 Parsons on Contracts, 528, 529; *Cadwell v. Blake*, 6 Gray, 402; *Langdell's Cases on Contracts* (1st ed.), 626.

7 Cal. Civ. Code, § 1437. See, also, Campbell on Sales, 275; referring generally to notes to *Pordage v. Coll*, 1 Wms. Saund. 319 n; Langdell's Cases on Contracts (1st ed.), 640; and to *Cutter v. Powell*, 2 Smith's Lead. Cas. 1; and for instances relating to sales of goods to *Atkinson v. Smith*, 14 Mees. & W. 695; *Withers v. Reynolds*, 2 Barn. & Adol. 882; and *Bankart v. Bowers*, Law R. 1 Com. P. 484. See these cases in Langdell's Cases on Contracts (1st ed.), 748, 751, 753.

8 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345.

9 Cal. Civ. Code, § 1438. And compare Story on Sales, § 248; 1 Bouvier Law Dict. tit. Condition (14th ed.), 313. Consult, also, Winfield's Words etc. 130; quoting, *Chapin v. School District*, 35 N. H. 450; *N. & N. W. R. Co. v. Jones*, 2 Cold. 584; *Ludlow v. N. Y. & H. R. R. Co.* 12 Barb. 442.

10 *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345. And in this respect it differs from what is denominated among merchants a "sale and return," which creates a condition subsequent merely, and passes the title at once, subject to the right to rescind and return: *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345; referring to *Hunt v. Wyman*, 100 Mass. 193; *Wharton on Contracts*, 570.

11 See Cal. Civ. Code, §§ 1439, 1440. Performance of conditions, prevention, waiver, impressibility, etc.: See 2 Schouler on Personal Property, §§ 281-284. Conditions in general, dependence of stipulations, performance, etc.: See Bennett's Benjamin on Sales, §§ 560-573; 2 Corbin's Benjamin on Sales, §§ 852-868; Story on Sales, §§ 246-248, 251. It is well settled that a conditional sale, dependent upon an act to be done, does not pass title if such act is not done: *Sere v. McGovern*, 65 Cal. 244; referring to *Whitney v. Eaton*, 15 Gray, 225; *Langdell's Cases on Sales*, 717; *Stone v. Perry*, 60 Me. 48; *Paul v. Reed*, 52 N. H. 136; *Russell v. Minor*, 22 Wend. 659. And hence it is erroneous to hold that although the conditions of a sale of partnership property, requiring the payment of the consideration within a limited time, had not been performed, yet the title passed to the purchaser who became the absolute owner of the property: *Sere v. McGovern*, 65 Cal. 244.

§ 295. *Conditions in sales.*—*Absolute or conditional sale, etc.*—Whether a transaction in which the seller delivered a bill of sale of the goods to the purchaser, and accepted the latter's notes for payment, was a conditional or an absolute sale,<sup>1</sup> is a question that the jury may properly decide from the evidence.<sup>2</sup>

*Condition or warranty.* It has been held that any undertaking which may be implied on the part of the vendor as to the merchantable quality of logs, which were so situated that they could not be inspected by the vendee at the time of an executory contract for their sale, is to be treated as a condition rather than a warranty, as to obvious defects, discoverable upon delivery.<sup>3</sup>

*Prerequisite of performance of conditions precedent, etc.* It is an elementary principle that where there is a condition precedent<sup>4</sup> or concurrent embodied in a sale,<sup>5</sup> upon the performance of which the transfer of title depends,<sup>6</sup> the buyer will acquire no title to the thing,<sup>7</sup> even as against his creditors, and notwithstanding delivery of the chattel, before that condition has been fulfilled.<sup>8</sup> And the same rule applies where there are other conditions precedent on the buyer's part than that of payment, and other matters dependent thereon than the transfer of the title.<sup>9</sup>

*Act of third person.* So the principle stated is applicable wherever by the terms of the bargain, as made by the parties, something essential is to be first done by some third party,<sup>10</sup> as where the price is to be fixed by valuers,<sup>11</sup> or on a sale of goods subject to the inspection or approval of some person mutually designated by the parties;<sup>12</sup> or where a chattel is sold, subject to the test of a third person as to whether it accomplishes the intended purpose.<sup>13</sup>

1 Various conditions in sales: See later section on that subject. Conditional sale distinguished from mortgage: *Slowey v. McMurray*, 27 Mo. 113; 72 Am. Dec. 251, n. 257; § 24, on SALE OR MORTGAGE.

2 *Crabtree v. Segrist*, 6 Pacif. Rep. (N. M.) 202. But a writing showing an absolute sale of a horse cannot be changed or enlarged by parol evidence to the effect that such sale was in fact conditional, as against an attaching creditor who had been shown the writing: *Dixon v. Blondin*, 5 Atl. Rep. (Vt.) 514; referring to *Sanborn v. Chittenden*, 27 Vt. 171. Evidence held to warrant if it did not require a finding that a sale was unconditional: *Marble v. Moore*, 102 Mass. 443.

3 *Thompson v. Libby*, 29 N. W. Rep. (Minn.) 150. The receiving and retaining of the logs by the vendee under the contract, with knowledge of such defects though complainingly done, was, however, considered to have the effect of a waiver of such implied condition as to quality: *Thompson v. Libby*, 29 N. W. Rep. 150; referring to *Haase v. Nonnimacher*, 21 Minn. 486, and cases cited; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Locke v. Williamson*, 40 Wis. 377; *Olson v. Mayer*, 56 Wis. 551; 14 N. W. Rep. 640; *Pollock Pri. Contr.* 464. Condition precedent distinguished from warranty: See 2 Schouler on Personal Property, §§ 316, 344, 349. And consult later sections of this chapter on SALES BY SAMPLE OR DESCRIPTION, and GENUINE CHARACTER OF SECURITIES.

4 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345.

5 See preceding section on CONDITIONS IN GENERAL.

6 Transfer of title in general: See chapter on that subject.

7 See *Sere v. McGovern*, 65 Cal. 244.

8 See 2 Kent Com. 497; Story on Sales, § 251; 2 Schouler on Personal Property, § 285; citing, *Bishop v. Shillito*, 2 Barn. & Ald. 329; Langdell's Cases on Sales, 710; *Shepherd v. Harrison*, Law R. 4 Q. B. 196, 493; Law R. 5 H. L. 116; Langdell's Cases on Sales, 996; *Strong v. Taylor*, 2 Hill, 326.

9 As the furnishing of bags regarded as a condition precedent to delivery: *Russell v. Witt*, 38 Ind. 19; 2 Schouler on Personal Property, § 285; referring, also, to *Thompson v. Ray*, 46 Ala. 224; *Lowry v. Barelli*, 21 Ohio St. 324.

10 See citations in succeeding notes. Action of third party in contracts generally: 1 Wharton on Contracts, §§ 593-596.

11 See *Vickers v. Vickers*, Law R. 4 Eq. 529; *Nutting v. Dickinson*, 8 Allen, 540; *Hutton v. Pearce*, 26 Ark. 382.

12 See *Brogden v. Marriott*, 2 Bing. N. C. 473; *Thurnell v. Balbirnie*, 2 Mees. & W. 786; *Dunstan v. McAndrew*, 44 N. Y. 72; *Nofsinger v. Ring*, 71 Mo. 149; 35 Am. Rep. 456 (fitness of meat); *Bennett's Benjamin on Sales*, § 574.

13 See *Robbins v. Clark*, 129 Mass. 145; *Batterbury v. Vyse*, 2 Hurl. & C. 42. Source of paragraph: 2 Schouler on Personal Property, § 236. Payment dependent on action of third person, etc.: See *Mills v. Bayley*, 2 Hurl. & C. 35; *Roberts v. Watkins*, 18 Com. B. N. S. 278; *Thompson v. Ray*, 46 Ala. 224; *Newlan v. Dunham*, 60 Ill. 233; *Dunstan v. McAndrew*, 44 N. Y. 72. Title vesting primarily in third party: See *Worthy v. Cole*, 69 N. C. 157. Other instances where co-operation of third party prerequisite to buyer's acquisition of title: See *Perkins v. Dacon*, 13 Mich. 81; *De Loach v. Hardee*, 64 Ga. 94. Condition that some act shall be done by a third person further discussed: 2 Corbin's Benjamin on Sales, § 870, n. 16; *Campbell on Sales*, 316, 317.

§ 296. **Impossibility of performance.**—*In general.* The usual exceptions as to waiver<sup>1</sup> and impossibility<sup>2</sup> apply to conditions contained in a contract of sale.<sup>3</sup> Impossibility of performance, owing to circumstances which impute no fault to the opposite party, affords an excuse for performance within the same narrow and uncertain range marked out for other contracts.<sup>4</sup>

*Actual impossibility.* Actual impossibility to perform, which arises from extraneous circumstances of inability merely, in the particular instance, does not amount to physical or moral impossibility, as the want of money to make a stipulated payment, etc.,<sup>5</sup> cannot excuse one from the legal obligation to perform the condition, or from liability in damages for non-performance;<sup>6</sup> nor

does this effect result from the happening of a contingency which, from the nature of the transaction, the party binding himself ought to have expressly guarded against.<sup>7</sup>

*Legal impossibility.* But legal impossibility, occasioned by the passage of a statute rendering the act illegal, will, by the courts of this country, in furtherance of the local public policy, be deemed a sufficient excuse for non-performance.<sup>8</sup>

*Act of God or human agency.* Yet while many of the modern decisions are less particular than former ones in admitting impossibility as an excuse for not fulfilling bargains,<sup>9</sup> and the obligor has been relieved in several instances on the ground that performance had become physically impossible by the act of God,<sup>10</sup> still there are other cases which clearly refuse to extend so sweeping a cause of exemption to an impossibility occasioned by any human agency.<sup>11</sup>

1 Waiver in general: 2 Bouvier Law Dict. (14th ed.)

2 See succeeding portions of section. Impossibility of performance of contracts discussed: 12 Cent. L. J. 4. And see *City Bank v. Babcock*, 1 Holmes, 180-184; 8 Fed. Dec. 568, and notes, 570.

3 2 Schouler on Personal Property, § 287; referring in regard to waiver or prevention of performance to *Clarke v. Westropp*, 18 Com. B. 765; and also to *Batterbury v. Vyse*, 2 Hurl. & C. 42; and as to disfavor shown to excuse of impossibility, to *Smoot v. United States*, 15 Wall. 36.

4 2 Schouler on Personal Property, § 287.

5 Further illustrations: *James v. Morgan*, 1 Lev. 111; *Thornburn v. Whitacre*, 2 Raym. Ld. 1164. And see *Gilpins v. Consequa*, 1 Peters C. C. 91.

6 2 Schouler on Personal Property, § 287, whence paragraph derived. And consult 2 Corbin's Benjamin on Sales, § 864, n. 14.

7 See *Kearon v. Pearson*, 7 Hurl. & N. 386.

8 See *Bailey v. De Crespigny*, Law R. 4 Q. B. 180; 2 Schouler on Personal Property, § 287; *Bennett's Benjamin on Sales*, § 571; *Campbell on Sales*, 315; citing, also, *Newby v. Sharp*, Law R. 8 Ch. D. 39; 25 Eng. Rep. 99.

9 Compare *Barker v. Hodgson*, 3 Maule & S. 267, with *Ford v. Cotesworth*, Law R. 7 Q. B. 127; *Kearon v. Pearson*, 7 Hurl. & N. 386; and *Taylor v. Caldwell*, 3 Best & Smith, 826.

10 The seller is held to be relieved from his promise to deliver by the death of the horse sold, or the spoilation of a specific growing

crop from natural causes before the time of gathering it: See *Shep. Touch.* 173; *Howell v. Coupland*, Law R. 9 Q. B. 462; Law R. 1 Q. B. 258; 16 Eng. Rep. 312.

11 2 *Schouler on Personal Property*, § 238, whence paragraph derived; citing, *Shep. Touch.* 173; *Bennett's Benjamin on Sales*, § 571; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Harmony v. Bingham*, 2 Kern. 106. Destruction by fire of an unfinished chattel which is being made to order, does not exempt the buyer from obligation to deliver: *Jones v. St. John's College*, Law R. 6 Q. B. 115; *School District v. Dauchy*, 25 Conn. 530; 68 Am. Dec. 371. Compare further on destruction of chattel, *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415, with *Bigler v. Hall*, 54 N. Y. 167. And consult 2 *Corbin's Benjamin on Sales*, § 862, n. 11; *Campbell on Sales*, 314, 315.

§ 297. **Stipulation concerning time and place of performance.**—*Time of performance.* The question whether stipulations as to the time of performance under a contract of sale are in the nature of conditions precedent, depends upon the point whether time appears to have been fairly understood between the parties as an essential element in the performance of the contract.<sup>1</sup> But the prevailing rule, applied frequently in contracts for successive deliveries, goes only to the extent of rendering the breach of diligent performance with respect to time, a cause of action for damages sustained by the buyer, like other independent stipulations on the seller's part, and not an occasion for rescinding the contract entirely, on the ground that a condition precedent had failed.<sup>2</sup>

*Place of performance.* So where a contract to sell cotton at a given price to arrive at one place, per ships from another, made these provisions, "cotton to be taken from the quay; customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale," it was held that this clause as to place of delivery was not a condition precedent against the sellers, but a stipulation in their favor,<sup>3</sup> and that the contract in effect placed the cotton at the buyer's risk and charge from the time of landing on the quay.<sup>4</sup> Yet under proper circumstances a stipulation as to

place of performance is to be treated as a condition precedent.<sup>5</sup>

1 2 Schouler on Personal Property, § 289, whence next paragraph also derived. And see Story on Sales, § 310.

2 See *Jonassohn v. Young*, 4 Best & Smith, 296; *Langdell's Cases on Contracts* (1st ed.), 722; *Simpson v. Crippin*, Law R. 8 Q. B. 14; 4 Eng. Rep. 200; doubting, *Hoare v. Rennie*, 5 Hurl. & N. 19; *Langdell's Cases on Contracts* (1st ed.), 574; *Bennett's Benjamin on Sales*, § 593; *Rogers v. Woodruff*, 23 Ohio St. 632; 13 Am. Rep. 276. Consult further, discussion of subject in *Campbell on Sales*, 281-294; 2 *Corbin's Benjamin on Sales*, § 909, n. 26. Latest leading cases on subject: *Honck v. Muller*, Law R. 7 Q. B. D. 92; 36 Eng. Rep. 264, n. 270; *Mersey Steel & Iron Co. v. Naylor*, Law R. 9 App. C. 434; 36 Eng. Rep. 164; *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159; *Norington v. Wright*, 115 U. S. 188; 21 Am. Law Reg. 395, n. 398; *Filley v. Pope*, 115 U. S. 213; *Pope v. Porter*, 102 N. Y. 366; 7 N. E. Rep. 304.

3 *Neill v. Whitworth*, Law R. 1 Com. P. 684.

4 *Neill v. Whitworth*, Law R. 1 Com. P. 164; as stated, 2 Schouler on Personal Property, § 290, whence next paragraph also derived.

5 *Thompson v. Ray*, 46 Ala. 224.

§ 298. *Notice.*—*When requisite.* Where sales are made, as is sometimes the case, “upon notice,” or with reference to a designated time, or the happening of some event, upon notice of which an act is to be performed,<sup>1</sup> the general rule is that one who binds himself to do a thing at a designated time, or on the occurrence of a particular event, must take notice at his peril, and perform his promise<sup>2</sup> when the time comes or the event occurs.<sup>3</sup> But if according to a just interpretation of the contract it is the other party who was bound to give notice when the time had arrived or the event happened, the giving of such notice becomes the real condition precedent<sup>4</sup> in the contract,<sup>5</sup> to which other acts like delivery are postponed.<sup>6</sup>

*Reasonable time after.* So if a person has contracted to do a thing on demand<sup>7</sup> or on notice, he will be entitled to a reasonable time in which to do the thing, after a demand made or notice given.<sup>8</sup>

*Terminating agreement.* Where a contract for the delivery of chattels of a certain description from time to time does not bind to any fixed limit, so that it is left

optional with either party to put an end to the agreement, the party seeking to terminate should give notice to the other of his intention in the premises.<sup>9</sup>

1 Notice in general: 2 Bouvier Law Dict. (14th ed.) 236. Notice in relation to contracts: 1 Wharton on Contracts, §§ 567, 574.

2 See *Vyse v. Wakefield*, 6 Mees. & W. 442.

3 2 Schouler on Personal Property, § 291. And this is the rule not only where the event is of a public character, so that buyer and seller are presumed to have equal opportunity of ascertaining when the condition precedent must be performed, but more particularly whenever the fact upon which the contract turns lies peculiarly within his own knowledge and privacy: 2 Schouler on Personal Property, § 291. And see *Watson v. Walker*, 23 N. H. 471, 491.

4 Condition precedent: See § 294, on CONDITIONS IN GENERAL.

5 Notice of name of ship in sales of goods "to arrive": *Campbell on Sales*, 296; citing, *Busk v. Spence*, 4 Camp. 329; *Greaves v. Legg*, 9 Ex. 709; 11 Ex. 642; 2 Hurl. & N. 110.

6 2 Schouler on Personal Property, § 291. And when actual knowledge of the essential fact is peculiarly in the obligee's breast, and particularly where the obligee reserves to himself the control of the fact, so that the exigency for performance shall occur when he so chooses, and not before, he is bound to give notice of the fact before he can compel the obligor to perform his engagement: 2 Schouler on Personal Property, § 291; citing, *Bennett's Benjamin on Sales*, § 577; *Haule v. Heming*, 6 Mees. & W. 654; *Vyse v. Wakefield*, 6 Mees. & W. 442; *Watson v. Walker*, 23 N. H. 471; *Haines v. Tucker*, 50 N. H. 307; *Quarles v. George*, 23 Pick. 400. Consult, further, 2 Corbin's Benjamin on Sales, § 872, n. 18.

7 Demand or request in relation to contracts: 1 Wharton on Contracts, §§ 575-577.

8 *Bennett's Benjamin on Sales*, § 577, n. e; referring to *Baker v. Mair*, 12 Mass. 121; *Newcomb v. Brackett*, 16 Mass. 161; *Eames v. Savage*, 14 Mass. 425; and also to *Topping v. Root*, 5 Cowen. 404; *Sanborn v. Benedict*, 78 Ill. 309; *Watson v. Garren*, 6 Up. Can. Q. E. 542.

9 *Houston etc. R. Co. v. Mitchell*, 38 Tex. 85; as stated, 2 Schouler on Personal Property, § 291 a; referring, also, for need of notice where option given, to *Kirkpatrick v. Alexander*, 44 Ind. 595.

§ 299. *Payment as condition precedent.—Transfer of title and risk.* It is the settled general doctrine that so soon as a bargain of sale of personal property is struck, the contract becomes complete, without actual payment or delivery,<sup>1</sup> and the property and risk of accident to the goods vests in the buyer,<sup>2</sup> although the payment or tender of the price is often a condition precedent implied in the contract, the performance of which alone entitles the buyer to the possession of the goods.<sup>3</sup>



*Payment and delivery as concurrent conditions.* Thus, where the circumstances of the transaction are such as to indicate that the seller agrees to transfer the property in consideration, not of the buyer's engagement to pay, as in credit sales,<sup>4</sup> but of his actually paying or securing the price, as in sales for payment on delivery,<sup>5</sup> there are concurrent conditions binding upon each party,<sup>6</sup> consisting of the seller's obligation to deliver, and the buyer's obligation to pay;<sup>7</sup> and neither party can sue the other for breach of contract without averring that he performed the condition on his part, or offered to do so.<sup>8</sup>

*Performance or waiver of condition.* And in this country it has been laid down that where there is a condition precedent attached to a contract of sale and delivery,<sup>9</sup> the property does not vest in the purchaser on delivery until he performs the condition, or the seller waives it;<sup>10</sup> and that the right continues in the vendor, even against creditors and subsequent purchasers of the vendee.<sup>11</sup>

*Delivery with reservation of title.* Accordingly, it is well settled that where goods are sold and delivered on condition that the property therein shall not vest in the buyer until the purchase money is paid or secured, such payment or adjustment of the purchase money is subject to the usual exception attending performance, a condition precedent<sup>12</sup> on the part of the buyer to the transfer of title<sup>13</sup> to himself from the seller.<sup>14</sup>

1 See citations in next note.

2 *Willis v. Willis*, 6 Dana, 48. And see 2 Kent Com. 492; *Morse v. Sherman*, 106 Mass. 430, 433; *Wade v. Moffitt*, 21 Ill. 110; 74 Am. Dec. 70; *Gilmour v. Supple*, 11 Moore P. C. C. 551, 556; *Langdell's Cases on Sales*, 632; *Calcutta Co. v. De Mattos*, 32 Law J. Q. B. 326, 329; *Dixon v. Yates*, 5 Barn. & Adol. 313; *Ross' Leading Cases*, 55, 74.

3 *Willis v. Willis*, 6 Dana, 48, 49. And see *Barnes v. Bartlett*, 15 Pick. 71, 77; § 224, on TRANSFER OF TITLE WITHOUT DELIVERY.

4 See § 272, in chapter on PAYMENT.

5 Rules of evidence in determining whether sale for cash on delivery or upon credit: 2 Schouler on Personal Property, § 367.

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6 Concurrent conditions: See § 294, on CONDITIONS IN GENERAL.

7 See citations in next note. When nothing is said in a contract for the sale of goods as to the time of payment, the law presumes that the sale is for cash: *Fishback v. Van Dusen*, 33 Minn. 111, 116. And upon a sale for cash, payment and delivery are concurrent and mutually dependent acts, and neither party is bound to perform without contemporaneous performance by the other: *Fishback v. v. Van Dusen*, 33 Minn. 111, 116.

8 See 2 Schouler on Personal Property, § 292; citing, *Rawson v. Johnson*, 1 East, 203; *Jackson v. Alloway*, 6 Man. & G. 942; *Bennett's Benjamin on Sales*, § 677. And independently of the question of ownership of the goods, it is a general rule in all executory agreements for the sale of chattels, that the seller's obligation to deliver, and the buyer's obligation to pay or render equivalent, are concurrent conditions in the nature of conditions precedent (see citations next given); and that performance, or the offer to perform, or a readiness and willingness to do what he was prevented from doing, is a prerequisite on the part of him who would enforce the contract against the other: 2 Schouler on Personal Property, § 253; citing, further, *Atkinson v. Smith*, 14 Mees. & W. 655; *Langdell's Cases on Contracts* (1st ed.), 751; *Bishop v. Shillito*, 2 Barn. & Ald. 329; *Langdell's Cases on Sales*, 710; *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Langdell's Cases on Contracts* (1st ed.), 743; *Warren v. Wheeler*, 21 Me. 484; *Dana v. King*, 2 Pick. 155; *Williams v. Healey*, 3 Denio, 363; *Sutton v. Campbell*, 2 Thomp. & C. 535. Payment or tender of price: See *Bussey v. Burnett*, 9 Mees. & W. 312; *Langdell's Cases on Sales*, 711; *Hutchings v. Munger*, 41 N.Y. 155; *Day v. Bassett*, 102 Mass. 445; *Phillips v. Williams*, 33 Ga. 537; 2 Schouler on Personal Property, § 293, making these citations, and referring, also, to *Story on Sales*, § 238.

9 Sometimes other conditions besides payment or adjustment of the price accompany delivery: See *Hill v. McKenzie*, 3 Thomp. & C. 122; *Dresser Man. Co. v. Waterston*, 3 Met. 9; *Dyer v. Libby*, 61 Me. 45; 2 Schouler on Personal Property, § 293; referring, also, to *Allen v. Delano*, 55 Me. 113; *Buckmaster v. Smith*, 22 Vt. 113; *Holt v. Holt*, 53 N. H. 276.

10 2 Kent Com. 497. And see *Bennett's Benjamin on Sales*, § 320, n. d. Compare *State v. O'Neil*, 58 Vt. 140; 2 Atl. Rep. 584. Waiver of condition of sale discussed: *Fishback v. Van Dusen*, 33 Minn. 111, 117.

11 2 Kent Com. 497; as quoted, 2 Schouler on Personal Property, § 294; referring, also, to *Green v. Rowland*, 16 Gray, 58.

12 See *Cobb v. Tufts*, 2 Tex. App. (Civ. Cas.) § 152.

13 Transfer of title in general: See previous chapter on that subject.

14 See *Bishop v. Shillito*, 2 Barn. & Ald. 329, n.; *Langdell's Cases on Sales*, 710; *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970; *Brandt v. Bowlby*, 2 Barn. & Adol. 932; *Langdell's Cases on Sales*, 925; *Clark v. Wells*, 45 Vt. 4; 12 Am. Rep. 187; *Duncans v. Stone*, 45 Vt. 118; *Porter v. Pettengill*, 12 N. H. 209; *Paul v. Reed*, 52 N. H. 136; *Tyler v. Freeman*, 3 Cush. 251; *Langdell's Cases on Sales*, 712; *Whitney v. Eaton*, 15 Gray, 225; *Langdell's Cases on Sales*, 717; *Forbes v. Marsh*, 15 Conn. 384; *Morris v. Rexford*, 18 N. Y. 552; *Hasbrouck v. Lounsbury*, 26 N. Y. 598; *Henderson v. Lauck*, 21 Pa. St. 359; *Thompson v. Ray*, 46 Ala. 224; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24; *Shireman v. Jackson*, 14 Ind. 459; *Fifield v. Elmes*, 25 Mich. 48. Basis of foregoing matter in paragraph: 2 Schouler on Personal Property, § 29. And consult *Story on Sales*,

§ 113; *Cobb v. Tufts*, 2 Tex. App. (Civ. Cas.) § 152. It is said to be the doctrine universally sustained in America that a stipulation reserving title until payment, though possession is given under an agreement to sell, is valid as between the parties, and as against third persons with notice: 1 Corbin's *Benjamin on Sales*, 425, citing the cases by States.

§ 300. *Condition sustained despite delivery.*— *Delivery through agents.* The doctrine that there is no transfer of title before payment, where there is a sale and delivery on condition of payment, applies where a servant delivers the goods by mistake without receiving the money,<sup>1</sup> and where there is a consignment of a piano on the previous distinct understanding that it shall remain the property of the consignor until paid for, and shall be further transferred only with a like reservation of the consignor's rights.<sup>2</sup>

*Delivery under expectation of payment.* So there is no necessary transfer of title where delivery is made and possession allowed to be retained by the buyer even for a considerable period, under the expectation of immediate payment.<sup>3</sup>

*Credit, notes, etc.* And the rule requiring the performance of the condition precedent of payment, despite delivery, applies not only to cash sales, but also to those upon a definite credit,<sup>4</sup> and wherever delivery is made upon the express or implied condition that title shall remain in the seller until the giving of the buyer's notes for the price, with or without indorsement, or the furnishing by him of certain securities.<sup>5</sup>

*Reservation of title.* Possession, given under the general condition that no property in the chattel shall pass until it is fully paid for, is frequently held not to preclude the paramount title of the original *bona fide* seller,<sup>6</sup> and a chattel may also be delivered with such a condition as to title by sale, while meantime the purchaser is to use it by way of loan or hire,<sup>7</sup> under the mutual agreement of the parties.<sup>8</sup>

1 See *Bishop v. Shillito*, 2 Barn. & Ald. 329 n; *Langdell's Cases on Sales*, 710.

2 See *Cole v. Mann*, 3 Thomp. & C. 380. Basis of paragraph: 2 Schouler on Personal Property, § 245. Like views where packages of liquors intrusted to an express company, to be transported and delivered to the consignees upon payment of the purchase price and transportation charges: *State v. O'Neal*, 58 Vt. 140; 2 Atl. Rep. 536. Entry on books of warehouseman or other custodian: See *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970; *Dixon v. Yates*, 5 Barn. & Adol. 313; *Ross' Leading Cases*, 48.

3 See *Gibson v. Tobey*, 46 N. Y. 627; *Tyler v. Freeman*, 3 Cush. 261, *Langdell's Cases on Sales*, 712; *Sage v. Sleutz*, 23 Ohio St. 1; *Johnston v. Eichelberger*, 13 Fla. 250; *Stone v. Perry*, 60 Me. 43; 2 Schouler on Personal Property, § 255; citing, also, *Shepherd v. Harrison*, Law R. 4 Q. B. 176, 493; Law R. 5 II. L. 116; *Langdell's Cases on Sales*, 936; and referring to *Godts v. Rose*, 17 Com. B. 229; *Langdell's Cases on Sales*, 970. Consult further, *Bennett's Benjamin on Sales*, p. 786, § 677, n. f.

4 See *Little v. Page*, 44 Mo. 412; *Whitney v. Eaton*, 15 Gray, 225; *Langdell's Cases on Sales*, 717; *Hasbrouck v. Lounsbury*, 26 N. Y. 538; *Fifield v. Elmer*, 25 Mich. 48; *Clark v. Wells*, 45 Vt. 4; 12 Am. Rep. 187.

5 See *Dresser Manuf. Co. v. Waterston*, 3 Met. 9; *Hirschhorn v. Canney*, 98 Mass. 149; *Stone v. Perry*, 60 Me. 48. Basis of paragraph: 2 Schouler on Personal Property, § 256. And consult *Bennett's Benjamin on Sales*, p. 334, § 320, n. d.

6 See *Sage v. Sleutz*, 23 Ohio St. 1; *Deshon v. Bigelow*, 8 Gray, 159; *Cole v. Mann*, 3 Thomp. & C. 380; *Powell v. Preston*, 3 Thomp. & C. 644.

7 See *Enlow v. Klein*, 79 Pa. St. 483, 490; *Chamberlain v. Smith*, 44 Pa. St. 431, 433, 434. And consult *Hunt v. Wyman*, 103 Mass. 138, 200.

8 See *Forbes v. Marsh*, 15 Conn. 384; *Shireman v. Jackson*, 14 Ind. 459. Basis of paragraph: 2 Schouler on Personal Property, § 238; § 20, ON PRIVILEGE OF PURCHASE.

§ 301. **Rights of creditors and purchasers.**—*Attaching creditors.* The condition precedent or concurrent of payment as a prerequisite to transfer of title, imposed by the seller upon delivery, will generally take effect<sup>1</sup> in every *bona fide* transaction,<sup>2</sup> against not only the buyer, but all who may claim under him, including his attaching creditors,<sup>3</sup> even though the price may be tendered<sup>4</sup> on their behalf.<sup>5</sup>

*Bona fide purchasers.* And it may now be regarded as the prevalent doctrine in this country, aside from any exceptions arising out of negotiable or quasi-negotiable instruments,<sup>6</sup> that a sale of personal property made by one to whom the chattel was delivered by the

original seller on condition that the property should not pass until the chattel was paid for,<sup>7</sup> confers no better title upon a *bona fide* purchaser without notice from the original buyer,<sup>8</sup> than was possessed by the buyer himself,<sup>9</sup> or by his attaching creditors, or a purchaser with actual notice of the condition;<sup>10</sup> and that as against all of these the original seller may with due diligence follow up his rights, and reclaim the chattel as his own,<sup>11</sup> for non-fulfillment of the condition *bona fide* annexed to the delivery,<sup>12</sup> in a transaction free from fraud on his part.<sup>13</sup>

*Special views.* But there are decisions in Illinois, Kentucky, and some other States under which the condition reserving title after delivery appears to be sustained between the parties, but not as against *bona fide* purchasers or attaching creditors without notice.<sup>14</sup> And in Pennsylvania,<sup>15</sup> and in Alabama, a distinction is made between possession under a hiring with the privilege of purchasing, which is valid as to creditors and purchasers, and possession under a conditional contract of sale, which is void as to such third parties.<sup>16</sup>

*Registration acts.* Furthermore, in a number of the States, statutes have been enacted to the effect that contracts for conditional sales, where possession is delivered and the property reserved to the seller to secure the price, shall be void as to the vendee's creditors and vendees without notice, unless such contracts are in writing, and filed or recorded in the office of some public officer, usually the clerk of the town or county.<sup>17</sup>

1. Otherwise in Pennsylvania: See *Brunswick v. Hoover*, 95 Pa. St. 508; 49 Am. Rep. 674.

2. Otherwise where transfer is a dishonest device regarded as fraudulent: See *Taylor v. Pope*, 5 Cold. 416.

3. See *Stone v. Perry*, 60 Me. 43; *Duncans v. Stone*, 45 Vt. 118; *Paul v. Reed*, 52 N. H. 153; *Holt v. Holt*, 53 N. H. 276; *Coggill v. Hartford* etc. R. R. Co. 3 Gray, 545; *Langdell's Cases on Sales*, 713; *Forbes v. Marsh*, 15 Conn. 334; *Lewis v. McCabe*, 49 Conn. 140; 41 Am. Rep. 217; *Ballard v. Burgett*, 40 N. Y. 314; *Langdell's Cases on Sales*, 730;

Stevens v. Brennan, 79 N. Y. 254; Cole v. Berry, 42 N. J. L. 308; 36 Am. Rep. 511; Sage v. Sleutz, 23 Ohio St. 1; Ridgeway v. Kennedy, 52 Mo. 24; Smith v. Lozo, 42 Mich. 6; Thorpe v. Fowler, 57 Iowa, 541; Aultman v. Mallony, 5 Neb. 178; 25 Am. Rep. 478.

4 Sometimes otherwise by legislation. See Duncans v. Stone, 45 Vt. 118.

5 See Sage v. Sleutz, 23 Ohio St. 1; Buckmaster v. Smith, 22 Vt. 203. Basis of paragraph: 2 Schouler on Personal Property, § 299.

6 See § 302, on WAIVER, ESTOPPEL, ETC.

7 See Cobb v. Tufts, 2 Tex. App. (Civ. Cas.) § 182.

8 Who is such *bona fide* purchaser: See Downs v. Belden, 46 Vt. 674; Stevens v. Brennan, 79 N. Y. 254.

9 See § 134, on SALE WITH CONDITION PRECEDENT.

10 See citations in next note. For any third party who knows that the original purchaser had come into possession of the goods is bound to inquire whether the title acquired was that of buyer, borrower, hirer, etc.: See Forbes v. Marsh, 15 Conn. 384. But compare Leighton v. Stevens, 19 Me. 154.

11 In sales where price payable in instalment: See McCombs v. Guild, 9 Lea, 81; Sumner v. Cottey, 71 Mo. 121. But compare Carpenter v. Scott, 13 R. I. 477.

12 Conditions not waived by seller merely taking purchaser's price notes. Heinbockle v. Zugbaun, 5 Mont. 344; 51 Am. Rep. 59.

13 See Coggill v. Hartford etc. R. R. Co. 3 Gray, 545; Langdell's Cases on Sales, 713; Deshon v. Bigelow, 8 Gray, 159; Hirschorn v. Canney, 93 Mass. 149; Hotchkiss v. Hunt, 49 Me. 213; Bigelow v. Huntley, 8 Vt. 151; Clark v. Wells, 45 Vt. 4; 12 Am. Rep. 187; Kimball v. Jackman, 42 N. H. 242; King v. Bates, 57 N. H. 446; Hart v. Carpenter, 24 Conn. 427; Brown v. Fitch, 43 Conn. 312; Ballard v. Burgett, 40 N. Y. 314; Langdell's Cases on Sales, 730; Dows v. Kidder, 84 N. Y. 121; Parker v. Baxter, 86 N. Y. 536; Cole v. Berry, 42 N. J. L. 303; 35 Am. Rep. 511; Price v. Jones, 3 Head, 84; Little v. Page, 44 Mo. 412; Southwestern Freight Co. v. Plant, 45 Mo. 517; Ridgeway v. Kennedy, 52 Mo. 24; Wangler v. Franklin, 70 Mo. 659; Fifield v. Elmer, 25 Mich. 43; Shireman v. Jackson, 14 Ind. 459; Baker v. Hall, 15 Iowa, 277. *Contra*, see Michigan Central R. R. Co. v. Phillips, 60 Ill. 130; Rose v. Story, 1 Pa. St. 190; 41 Am. Dec. 121; Hussey v. Thornton, 4 Mass. 405; 3 Am. Dec. 224; Wait v. Green, 26 N. Y. 556; Langdell's Cases on Sales, 728; Leighton v. Stevens, 19 Me. 154. Basis of paragraph: 2 Schouler on Personal Property, § 300; Heinbockle v. Zugbaun, 5 Mont. 344; 51 Am. Rep. 59. And see Story on Sales, § 313; Sargent v. Metcalf, 5 Gray, 306; 66 Am. Dec. 263; Burbank v. Crooker, 7 Gray, 153; 66 Am. Dec. 470, n. 472; Bailey v. Harris, 8 Iowa, 331; 74 Am. Dec. 312, n. 313. Doctrines in the various States discussed: 1 Corbin's Benjamin on Sales, §§ 437-461; Bennett's Benjamin on Sales, § 310, n. d; Harkness v. Russell, 118 U. S. 663, 670-681. And see Marvin Safe Co. v. Norton, 43 N. J. L. 412; 57 Am. Rep. 566, 567. Doctrine in New York discussed: 24 Alb. L. J. 264. Considering recent case of Comer v. Cunningham, 77 N. Y. 321; 33 Am. Rep. 626; and conflicting cases of Wait v. Green, 36 N. Y. 553; Langdell's Cases on Sales, 728; and Ballard v. Blingett, 40 N. Y. 314; Langdell's Cases on Sales, 730; also quoting Austin v. Dye, 46 N. Y. 500; and Smith v. Lynes, 5 N. Y. 41; Langdell's Cases on Sales, 724.

14 See March v. Wright, 46 Ill. 487; Vaughn v. Hopson, 10 Bush, 337; 2 Schouler on Personal Property, § 300, p. 288, n.

15 See full statement in Marvin Safe Co. v. Norton, 43 N. J. L. 412; 57 Am. Rep. 563-568.

16 See *Krause v. Commonw.* 93 Pa. St. 418, 421; *Dando v. Foulds*, 105 Pa. St. 74, 76; *Edward's Appeal*, 105 Pa. St. 103; *Forrest v. Nelson*, 193 Pa. St. 481, 488; *McCall v. Prescott*, 64 Ala. 254, 258. And consult *Haak v. Lindeman*, 64 Pa. St. 499, 501; 37 Am. Rep. 661; *Stadtfield v. Huntsman*, 92 Pa. 37; 37 Am. Rep. 661, n. 634; *Brunswick etc. Co. v. Hoover*, 95 Pa. St. 508; 49 Am. Rep. 674; §§ 19 and 22, on DELIVERY UNDER CONDITIONAL SALE, and SALE OR LEASE; *Sumner v. Woods*, 52 Ala. 59; 42 Am. Rep. 104; *Dudley v. Abner*, 52 Ala. 572, 579. Compare *Leigh v. Mobile etc.* R. R. 53 Ala. 165, 177; *Cole v. Berry*, 42 N. J. L. 303; 46 Am. Rep. 511, 517.

17 See *Boynton v. Libby*, 62 Me. 253; *Bugbee v. Stevens*, 53 Vt. 389; *Whiteomb v. Woodworth*, 54 Vt. 544; *McClelland v. Nichols*, 24 Minn. 176; *Williams v. Porter*, 41 Wis. 422; *Kimball v. Post*, 44 Wis. 471; *Bunn v. Valley Lumber Co.* 51 Wis. 376; *Singer Co. v. Holcomb*, 40 Iowa, 33; *Myer v. Car Co.* 102 U. S. 1, 10; *Hewey v. R. I. Locomotive Works*, 93 U. S. 664; *Heryford v. Davis*, 102 U. S. 235. Basis of paragraph: 1 Corbin's *Benjamin on Sales*, § 461; § 22, on SALE OR LEASE. Attaching creditors with actual notice not affected by statute: *Dyer v. Thorstad*, 29 N. W. Rep. (Minn.) 345, discussing construction of such enactments.

§ 302. *Waiver, estoppel, etc.—Effect of waiver, etc.* Where goods are sold on condition of paying or securing the price, such condition precedent is subject to the usual exception that acts and conduct on the seller's part, from which an express or implied waiver of the condition may be inferred,<sup>1</sup> or which go to render due performance by the buyer impossible,<sup>2</sup> will excuse the buyer from a strict compliance with the condition precedent,<sup>3</sup> besides debarring the seller of his right to reclaim the goods<sup>4</sup> as his own.<sup>5</sup> Whether there has been a waiver is a question of fact, which may be proved by various species of evidence, by declarations, by acts, or by forbearance to act.<sup>6</sup>

*Existence of waiver.* And the important question in determining whether there has been a waiver of a condition of sale by delivery, is whether the vendor has manifested by his language or conduct, any intention or willingness to waive the condition and make the delivery unconditional and the sale absolute, without having received payment or the performance of the conditions of sale.<sup>7</sup> This must depend on the intent of the parties at the time, to be ascertained from their

conduct and language, and not from the mere fact of delivery alone.<sup>8</sup>

*Estoppel.* The original seller would, under suitable circumstances, be estopped by his own representations, or acts and conduct, from claiming the goods as his own against a third party who had purchased them in good faith without knowledge of the failure to fulfill a condition accompanying delivery.<sup>9</sup> And there are decisions to the effect that a seller who not only gives up possession of the goods, but also turns over to the buyer a quasi-negotiable instrument in the nature of a bill of lading,<sup>10</sup> so as to vest the latter with the full *indicia* of ownership,<sup>11</sup> cannot afterwards recover the goods represented by the instrument, under a claim that the goods were conditionally sold, so as to defeat the title of one who has *bona fide* purchased or advanced on the security of the instrument.<sup>12</sup>

1 See *Fishback v. Van Dusen*, 33 Minn. 111, 117.

2 Element of impossibility by death: See *McGraw v. Gilmes*, 83 N. C. 162.

3 Condition precedent: See § 274, on CONDITIONS IN GENERAL.

4 See § 305, on RESUMPTION OF POSSESSION.

5 2 Schouler on Personal Property, § 304. But as the title to the goods fully vests in the buyer, the unpaid seller's remedies becomes, aside from his lien for the price, those of an ordinary creditor, and subject to the familiar principle that those with legal demands against a debtor who first attach will take the precedence: 2 Schouler on Personal Property, § 304.

6 *Fishback v. Van Dusen*, 33 Minn. 111, 118.

7 *Fishback v. Van Dusen*, 33 Minn. 111, 117.

8 *Fishback v. Van Dusen*, 33 Minn. 111, 118. However the waiver is proved, the question is whether the vendor has voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition: *Fishback v. Van Dusen*, 33 Minn. 111, 118; citing, *Fuller v. Bean*, 32 N. H. 290-303; *Smith v. Dennie*, 6 Pick. 262; 17 Am. Dec. 369; *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720; *Hammitt v. Linneman*, 48 N. Y. 399.

9 2 Schouler on Personal Property, § 305. But compare *Zuchtmann v. Roberts*, 109 Mass. 53; 12 Am. Rep. 663. And see *Barnard v. Campbell*, 55 N. Y. 456.

10 See § 211, on SIGNIFICATION OF TERM "DOCUMENTS OF TITLE."

11 Ostensible or apparent ownership or authority, §§ 175, 210.



12 See Mich. Cent. R. R. Co. v. Phillips, 69 Ill. 190; Barnard v. Campbell, 55 N. Y. 456; Western Transp. Co. v. Marshall, 4 Abb. N. Y. App. 575; Itawls v. Deshler, 4 Abb. N. Y. App. 12. But see Brandt v. Focht, 1 Abb. N. Y. App. 185; Dows v. Kidder, 84 N. Y. 121; Parker v. Baxter, 86 N. Y. 536; Hirschorn v. Canney, 98 Mass. 149. Basis of paragraph: 2 Schouler on Personal Property, § 301. In some States this exception would be extended to a sub-sale of stock with a power of attorney indorsed thereon: Cherry v. Frost, 7 Lea, 1.

§ 303. **Waiver by delivery.**—*If unqualified and unconditional.* The doctrine is said to be uniform and well established<sup>1</sup> that if the vendor unqualifiedly and unconditionally delivers the goods to the vendee without insisting on performance of conditions, intending to rely solely upon the personal responsibility of the vendee, the title passes to the latter,<sup>2</sup> and that the vendor cannot afterwards reclaim the property, even if the condition is never performed, but his only remedy is upon the contract for the purchase money.<sup>3</sup>

*Presumption of.* And the weight of authority seems to be<sup>4</sup> that a delivery, apparently unrestricted and unconditional of goods sold for cash, is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser.<sup>5</sup>

*Inference of conditional delivery.* But a sale does not *ipso facto* become absolute when a delivery is made, unaccompanied by any express declaration that is conditional,<sup>6</sup> and it is sufficient if the intent of the parties that the delivery is conditional can be inferred from their acts and the circumstances of the case.<sup>7</sup>

*Sight priority of delivery.* Nor is there a waiver of the condition of immediate payment where the delivery is intended to be substantially simultaneous with payment, but happens to precede it by a short period.<sup>8</sup>

1 According to Fishback v. Van Dusen, 33 Minn. 111, 118.

2 See citations in next note.

3 See 2 Kent Com. 496; Carleton v. Sumner, 4 Pick. 516; Dresser Manuf. Co. v. Waterston, 3 Met. 9; Farlow v. Ellis, 15 Gray, 229;

Langdell's Cases on Sales, 720; Goodwin v. Boston & L. R. Co. 111 Mass. 487; Scudder v. Bradbury, 106 Mass. 422; Haskins v. Warren, 115 Mass. 514; Freeman v. Nichols, 116 Mass. 309; Bowen v. Burk, 13 Pa. St. 1-6; Mixer v. Cook, 31 Me. 40.

4 According to Fishback v. Van Dusen, 33 Minn. 111, 118.

5 See Scudder v. Bradbury, 106 Mass. 422; Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Hammett v. Linneman, 48 N. Y. 399; Smith v. Lynes, 5 N. Y. 41; Langdell's Cases on Sales, 734; Farlow v. Ellis, 15 Gray, 229; Langdell's Cases on Sales, 720.

6 See 2 Kent Com. 497; Leven v. Smith, 1 Denio, 571; Smith v. Dennie, 6 Pick. 272; 17 Am. Dec. 368.

7 Fishback v. Van Dusen, 33 Minn. 111, 116. Discussion of waiver by delivery: Bennett's Benjamin on Sales, pp. 335, 336, § 320, n. d. And see Story on Sales, § 313.

8 Commonw. v. Devlin, 6 N. E. Rep. (Mass.) 64; distinguishing Haskins v. Warren, 115 Mass. 514; and referring to Bussey v. Barnett, 9 Mees. & W. 312; Langdell's Cases on Sales, 711.

§ 301. *Seller's delay, etc.—Requirement of reasonable diligence.* In order that the seller may be able to show that there was no waiver of the condition of payment on his part, he must have pursued his right with reasonable diligence, according to the circumstances,<sup>1</sup> by following up the buyer at once and without intermission, if the condition was cash payment or immediate adjustment of the price on delivery,<sup>2</sup> and not abating his vigilance after the maturity of the buyer's obligation, if the allowance of time was a part of the condition.<sup>3</sup>

*Insufficiency of mere negligence.* But waiver is a voluntary relinquishment of some right which, but for such waiver, the party would have enjoyed;<sup>4</sup> so that voluntary choice is of the essence of such waiver, and mere negligence is insufficient, though from such negligence, unexplained, the intention of waiver may be inferred.<sup>5</sup>

*Justification of delay.* And among elements which may justify delay, or be considered in determining whether it amounts to waiver of the condition, are a trade usage, allowing an extended period for payment;<sup>6</sup> or the circumstance that the parties live far apart, or transact business through third parties who have to

notify the principals;<sup>7</sup> or the character of the chattel, as easily taken back or troublesome to remove.<sup>8</sup>

1 See citations in succeeding notes.

2 Delay in calling for buyer's note: *Smith v. Dennis*, 6 Pick. 262.

3 2 Schouler on Personal Property, § 304, whence paragraph derived. Allowing buyer to retain possession after time fixed for paying price: *Hutchings v. Munger*, 41 N. Y. 155. And see *Mixer v. Cook*, 31 Me. 340; *Bowen v. Burk*, 13 Pa. St. 146; *Scudder v. Bradbury*, 106 Mass. 427; *Goldsmith v. Bryant*, 26 Wis. 34.

4 *Fishback v. Van Dusen*, 33 Minn. 111, 117.

5 *Fishback v. Van Dusen*, 33 Minn. 111, 117. And see *Farlow v. Ellis*, 15 Gray, 229; *Langdell's Cases on Sales*, 720.

6 See *Stone v. Perry*, 60 Me. 48. But compare *Scudder v. Bradbury*, 106 Mass. 422.

7 See *Stone v. Perry*, 60 Me. 48; *Whitney v. Eaton*, 15 Gray, 225; *Langdell's Cases on Sales*, 717; *Hirschorn v. Canney*, 98 Mass. 149.

8 *Goldsmith v. Bryant*, 26 Wis. 34. Or the action of the buyer in obstructing the seller in the effort to procure payment: *Hill v. McKenzie*, 3 Thomp. & C. 122. And see *Tyler v. Freeman*, 3 Cush. 261; *Langdell's Cases on Sales*, 712. Basis of paragraph: 2 Schouler on Personal Property, § 304.

§ 305. **Resumption of possession.** — *Notice, etc., as prerequisite.* An actual delivery of possession to the buyer by a seller, stipulating to retain the right of property, may be so far incompatible with the further retention of the right of possession as to render it incumbent upon the seller to give notice, or to make some explicit declaration, before he can retake the goods.<sup>1</sup> But on putting the other party at default, a seller may resume possession of chattels conditionally sold.<sup>2</sup>

*On refusal of payment.* Where a purchaser refuses payment upon getting possession of goods delivered to him in pursuance of an understanding, express or implied, that payment and delivery should be simultaneous, the seller may reclaim the goods as his own,<sup>3</sup> if he is reasonably prompt in asserting his rights in the premises.<sup>4</sup>

1 *Giddey v. Altman*, 27 Mich. 206; so cited, 2 Schouler on Personal Property, § 298; referring, however, to *Powell v. Preston*, 3 Thomp. & C. 644.

2 2 Schouler on Personal Property, § 298, whence next paragraph also derived. If the seller reserves title, and it is agreed that on de-

fault he may enter the buyer's premises and retake the property, this license is irrevocable, and the seller will not be liable in trespass for such entry: 1 Corbin's Benjamin on Sales, § 428; relying upon Walsh v. Taylor, 39 Md. 592; and referring, also, to McClelland v. Nichols, 24 Minn. 176.

3 See Fishback v. Van Dusen, 33 Minn. 111, 116; Bennett's Benjamin on Sales, p. 786, § 677, n. f; Story on Sales, p. 344, § 313.

4 See Atkinson v. Smith, 4 Mees. & W. 695; Langdell's Cases on Contracts (1st ed.), 751; Withers v. Reynolds, 2 Barn. & Adol. 882; Langdell's Cases on Contracts (1st ed.), 748; Henderson v. Lauck, 21 Pa. St. 351; Adams v. O'Connor, 100 Mass. 515; Leven v. Smith, 1 Denio, 571; Paul v. Reed, 52 N. H. 136; Dashon v. Bigelow, 8 Gray, 151; Ridgeway v. Kennedy, 52 Mo. 24.

§ 306. Sales on instalment plan.—*In general.* If the contract of the parties be such as to indicate that the seller shall retain his right of ownership after delivery, notwithstanding a partial payment or partial adjustment of the price,<sup>1</sup> as in the case where chattels are sold payable in instalments,<sup>2</sup> under a plan which prevails in various parts of this country with regard to pianos, sewing-machines, etc.,<sup>3</sup> the condition of payment<sup>4</sup> is enforceable to the extent of making full adjustment a prerequisite to the acquirement of title by the buyer.<sup>5</sup>

*Discrimination from similar transactions.* And it has been suggested that contracts of this uncertain description should be reduced to writing, so as to show clearly the respective rights of the parties, and enable the courts to discriminate between a sale conditional upon payment by instalments, and that which is in truth a mortgage transaction,<sup>6</sup> or a bailment,<sup>7</sup> such as a lease,<sup>8</sup> giving the privilege of purchase.<sup>9</sup>

*Special provisions.* The construction of such contracts according to their tenor, gives just scope to the mutual undertaking of the parties if the agreement contains an option to buy or hire in favor of the one party,<sup>10</sup> or other special conditions,<sup>11</sup> to be observed by the other.<sup>12</sup>

*Forfeiture of partial payments.* On a sale reserving title till the price is paid, many of the cases hold that

partial payments are forfeited on default of the residue;<sup>13</sup> but in courts possessing equity powers, the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price, to retain only so much as will compensate him;<sup>14</sup> and if the seller who retains title to property delivered under a conditional sale, permits the buyer to retain possession, and receives payments after the default, this operates as a waiver of the forfeiture,<sup>15</sup> and enables the buyer to become the owner of the property by making tender of the residue of the price.<sup>16</sup>

1 See citations in succeeding notes. Sales upon partial delivery or partial payments discussed: 2 Schouler on Personal Property, § 303.

2 Instalment in general: 1 Bouvier Law Dict. (14th ed.) 725. Sales upon instalments discussed: 8 South. L. Rev. N. S. 228.

3 See following illustrative cases: *Hine v. Roberts*, 48 Conn. 268; 40 Am. Rep. 170; *Singer Manuf. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 21; *Knittel v. Cushing*, 57 Tex. 354; 44 Am. Rep. 598; *Lucas v. Campbell*, 83 Ill. 447; 31 Am. Rep. 81; *Sumner v. Cotley*, 71 Mo. 121; *Singer Manuf. Co. v. Graham*, 8 Or. 17; 34 Am. Rep. 572; *Hervey v. Locomotive Works*, 93 U. S. 664.

4 Payment as condition precedent: See preceding section on that subject.

5 2 Schouler on Personal Property, § 297; citing, *Sage v. Sleutz*, 23 Ohio St. 1; *Sutton v. Campbell*, 2 Thomp. & C. 595; *Cole v. Munn*, 3 Thomp. & C. 330; *Preston v. Whitney*, 23 Mich. 260; *Giddey v. Altman*, 27 Mich. 206; *Goldsmith v. Bryant*, 26 Wis. 34.

6 Sale or mortgage: See *Rockwell v. Humphreys*, 57 Wis. 410, 414; *Cook v. Lion Fire Ins. Co.* 7 Pacif. Rep. (Cal.) 784; *Russell v. Harkness*, 7 Pacif. Rep. (Utah) 865; *Glass v. Doane*, 15 Ill. App. 63; *Turner v. Kerr*, 44 Mo. 429, 431; *Wilmerding v. Mitchell*, 42 N. J. L. 476, 479; § 24, discussing this subject.

7 2 Schouler on Personal Property, § 297; referring to *Rowan v. Union Arms Co.* 36 Vt. 124; *Singer Manuf. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 21.

8 Sale or lease: See § 22.

9 See *Sumner v. Cotley*, 71 Mo. 121. Conditional sale on instalment plan, under guise of renting, hiring, letting, etc.: See *Greer v. Church*, 13 Bush, 433; *Knittel v. Cushing*, 57 Tex. 354; 44 Am. Rep. 598, 600; *Singer Manuf. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 21; *Lucas v. Campbell*, 83 Ill. 447, 449; 31 Am. Rep. 81; *Price v. McCallister*, 3 Grant Cas. 243; *Singer Manuf. Co. v. Graham*, 8 Or. 17; 34 Am. Rep. 572; *Hine v. Roberts*, 48 Conn. 268, 269; 40 Am. Rep. 170; *Hervey v. Locomotive Works*, 93 U. S. 664.

10 See citations in last note.

11 Resumption of possession, etc.: See *Fleck v. Warner*, 25 Kan. 492; *Meagher v. Hollenberg*, 9 Lea, 392; *Wheeler Manuf. Co. v. Teetzlaff*, 53 Wis. 211.

12 2 Schouler on Personal Property, § 297.

13 See *Angier v. Taunton Paper Co.* 1 Gray, 621; *Knox v. Perkins*, 15 Gray, 529; *Colcord v. McDonald*, 128 Mass. 470; *Brown v. Haynes*, 52 Me. 578; *Everett v. Hall*, 67 Me. 497; *Haviland v. Johnson*, 7 Daly, 237; *Duke v. Shackelford*, 56 Miss. 552; *Howe Machine Co. v. Willie*, 85 Ill. 333; *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79; *Singer Manuf. Co. v. Treadway*, 4 Ill. App. 57; *Fleck v. Warner*, 25 Kan. 492; *Whelan v. Couch*, 26 Grant (Ont.) 74.

14 See *Preston v. Whitney*, 23 Mich. 260, 267; *Johnson v. Whittemore*, 27 Mich. 463, 470; *Hine v. Roberts*, 48 Conn. 267; 40 Am. Rep. 170; *Third Nat. Bank etc. v. Armstrong*, 25 Minn. 530; *Minneapolis etc. Co. v. Hally*, 27 Minn. 495; *Guilford v. McKinley*, 61 Ga. 230; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Ketchum v. Brennan*, 53 Miss. 596; *Gleason v. Knapp*, 26 Up. Can. C. P. 553.

15 See citations in next note.

16 See *Hutchings v. Munger*, 41 N. Y. 155; *Cushman v. Jewell*, 7 Hun, 525, 529; *Taylor v. Finley*, 48 Vt. 78; *Blair v. Hamilton*, 48 Ind. 32; *Shepard v. Cross*, 33 Mich. 96. But see *contra*, *Hegler v. Eddy*, 53 Cal. 597. Basis of paragraph: 1 Corbin's Benjamin on Sales, §§ 429-436.

### § 307. Various conditions.—*Conditions subsequent.*

Stipulations concerning price have sometimes the effect of passing property to the buyer, subject to a possible defeasance by condition subsequent,<sup>1</sup> as in the case of a sale providing that upon the purchaser's failure to pay over to the seller the first money received on the sub-sale of the goods, the chattels should be subject to the seller's order;<sup>2</sup> or in the contract termed "sale or return," as distinguished from a sale "on trial," where title passes subject to rescission by the buyer's exercise of his privilege of returning the goods.<sup>3</sup>

*Buyer's option.* The buyer's option in a contract of sale may also concern other points, as the time of delivery;<sup>4</sup> and sometimes the option involves the action of a third person, under the special contract.<sup>5</sup>

*Article to be satisfactory.* If an article is delivered to a purchaser, to be retained and paid for by him if satisfactory, the purchaser may repudiate the sale if such article prove *bona fide* and in fact unsatisfactory.<sup>6</sup>

*Conditions precedent.* Conditions precedent in sales are illustrated by the cases of sales of goods with privilege of purchase, "on trial," "on approval," "to arrive," etc.<sup>7</sup> But there is a conflict in the authorities upon the

full meaning of the word "cargo," in a contract of sale,<sup>8</sup> the question being whether it requires a single shipment of the whole cargo by one vessel or not, as a condition precedent on the seller's part.<sup>9</sup>

*Prerequisites to transfer of title.* Several rules have been formulated by leading text-writers on the present topic, whereby the performance of various conditions, precedent or concurrent, before or after the delivery of the goods sold, such as putting them into a deliverable state, or weighing, measuring, or testing them, is made a prerequisite to the transfer of the title to the goods.<sup>10</sup>

1 See § 193, on SALE WITH CONDITION SUBSEQUENT.

2 *Chamberlain v. Dickey*, 31 Wis. 68. Basis of foregoing matter; 2 *Schouler on Personal Property*, § 309; referring for other instances of conditions subsequent in sales, to *Smith v. Dallas*, 35 Ind. 253; and to *Worthy v. Cole*, 63 N. C. 157; *Sheffer v. Montgomery*, 65 Pa. St. 329; *Perkins v. Dacon*, 13 Mich. 81.

3 See *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582, 584; *Hickman v. Shimp*, 109 Pa. St. 16; 20 *The Reporter*, 345; § 21, on PRIVILEGE OF RETURN.

4 See *Colvin v. Weedman*, 50 Ill. 311; *Cleveland v. Sterrett*, 70 Pa. St. 204; *Snelling v. Hall*, 107 Mass. 134.

5 See *Hinchcliffe v. Barwick*, Law R. 5 Ex. D. 177; 31 Eng. Rep. 623. Basis of paragraph; 2 *Schouler on Personal Property*, § 313; referring on need of care on seller's part in making such stipulations, to *Snelling v. Hall*, 107 Mass. 134; and *Warren v. Kirk*, 24 La. An. 150.

6 *Exhaust Ventilator Co. v. Chicago etc. Ry. Co.* 28 N. W. Rep. (Wis.) 343; 22 *The Reporter*, 381.

7 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 *The Reporter*, 345; *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582; *Bennett's Benjamin on Sales*, §§ 586, 595; § 194, on SALE WITH CONDITION PRECEDENT; § 20, on PRIVILEGE OF PURCHASE.

8 See citations in next note.

9 Compare *Ireland v. Livingston*, Law R. 2 Q. B. 99; Law R. 5 Q. B. 516; Law R. 5 H. L. 395; 2 Eng. Rep. 424, with *Kruger v. Blanck*, Law R. 5 Ex. 179. Basis of paragraph; 2 *Schouler on Personal Property*, § 315; referring, also, to *Bennett's Benjamin on Sales*, §§ 589-591; *Tamvaco v. Lucas*, 1 El. & E. 581, 592. And consult *Campbell on Sales*, 296, 297.

10 See *Harkness v. Russell*, 118 U. S. 663, 667, 668. Putting into deliverable state: See § 86; *Foster v. Ropes*, 111 Mass. 10, 15; *Elgee Cotton Cases*, 22 Wall. 180, 183, 193; *Prescott v. Locke*, 51 N. H. 94, 101; *Langton v. Higgins*, 4 Hurl. & N. 402; *Langdell's Cases on Sales*, 867, 872; *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 636. Weighing, measuring, etc., to ascertain price: See § 87; *Lingham v. Eggleston*, 27 Mich. 324, 329; *Elgee Cotton Cases*, 22 Wall. 180, 183; *Hutchinson v. Hunter*, 7 Pa. St. 140, 143; *Prescott v. Locke*, 51 N. H. 94, 101; *Turley v. Bates*, 2 Hurl. & C. 200; *Langdell's Cases on Sales*, 692, 697-699; *Langton v. Higgins*, 4 Hurl. & N. 402; *Langdell's Cases on Sales*, 867, 872.

§ 308. Sales "on trial."—*In general.* A contract which provides for subjection of an article to trial, and becomes absolute only on approval, creates a condition precedent, which must be satisfied before the promise it qualifies becomes effectual.<sup>1</sup> Hence in sales "on trial" or "on approval,"<sup>2</sup> there is no sale till the approval is given,<sup>3</sup> either expressly or by implication,<sup>4</sup> resulting from keeping the goods beyond the time allowed for trial,<sup>5</sup> and the title does not pass until the option is thus determined.<sup>6</sup>

*Time for return of goods.* In sales on trial, the mere failure to return the goods within the time specified makes the sale absolute.<sup>7</sup> But the buyer is entitled to the full time agreed on, as he is at liberty to change his mind during the whole term.<sup>8</sup> And if no definite period of trial be stated, a reasonable time will be implied.<sup>9</sup>

*Notice and return.* It is the general rule that the buyer should notify the seller of the failure of the article to satisfy on trial,<sup>10</sup> within the reasonable or stated time;<sup>11</sup> but that if he finds the chattel unsuitable and unsatisfactory, he may exercise the option given him, and return the chattel peremptorily, without giving the seller any opportunity of remedying defects.<sup>12</sup>

*Consumption of goods.* Where the trial of goods which a party is entitled to make<sup>13</sup> involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, so as to render the sale absolute by the approval implied from thus accepting a part of the goods.<sup>14</sup>

1 Hickman v. Shimp, 109 Pa. St. 16; 20 The Reporter, 345.

2 Sales on trial coupled with a warranty: 2 Corbin's Benjamin on Sales, p. 792, § 911, n. 27.

3 See citations in note after next.

4 Implication of approval from failure to return or give notice of disapproval: 2 Corbin's Benjamin on Sales, p. 792, § 911, n. 27; citing, Hunt v. Wyman, 100 Mass. 198; Waters Heater Co. v. Mansfield, 48



Vt. 378; *Waters Heater Co. v. Smith*, 120 Mass. 444; *Wetherby v. Sleeper*, 101 Mass. 138; *Kahn v. Klabunde*, 50 Wis. 235.

5 *Elphick v. Barnes*, Law R. 5 C. P. D. 326; 30 Eng. Rep. 810; 20 Am. Law Reg. N. S. 240; *Bennett's Benjamin on Sales*, § 595; citing, also, *Mowbray v. Cady*, 40 Iowa, 604; *McCormick v. Basal*, 50 Iowa, 523; *Colton v. Wise*, 7 Ill. App. 395; *Delamater v. Chappell*, 48 Md. 244.

6 *Hickman v. Shimp*, 103 Pa. St. 16; 20 The Reporter, 345.

7 *Humphries v. Carvalho*, 16 East, 45; *Bennett's Benjamin on Sales*, § 595; citing, also, *Johnson v. McLane*, 7 Blackf. 591; *Spickler v. Marsh*, 36 Md. 222; *Dewey v. Erie Borough*, 14 Pa. St. 211; *Prairie Farmer Co. v. Taylor*, 60 Ill. 440; 18 Am. Rep. 621; *Aultman v. Theirer*, 34 Iowa, 272; *Waters Heater Co. v. Mansfield*, 48 Vt. 373; *Gibson v. Vail*, 53 Vt. 476. Same effect: 2 *Schouler on Personal Property*, § 311; *Story on Sales*, § 128.

8 *Ellis v. Mortimer*, 1 Bos. & P. N. R. 257; *Bennett's Benjamin on Sales*, § 595; referring, also, to *Elphick v. Barnes*, Law R. 5 C. P. D. 326; 20 Am. Law Reg. N. S. 240; 30 Eng. Rep. 810; *Aiken v. Hyde*, 99 Mass. 183; *Hartford Sorghum Manuf. Co. v. Brush*, 43 Vt. 528. And consult 2 *Schouler on Personal Property*, § 311; *Story on Sales*, § 250.

9 *Story on Sales*, § 128.

10 Notice of disapproval or rejection: 2 *Corbin's Benjamin on Sales*, p. 793, § 911, n. 27; citing, *Spickler v. Marsh*, 36 Md. 222; *Hall v. Merriwether*, 19 Tex. 224; *Prairie Farmer Co. v. Taylor*, 60 Ill. 440; 18 Am. Rep. 621; *Smalley v. Hendrickson*, 29 N. J. L. 371.

11 See *Dewey v. Erie Borough*, 14 Pa. St. 411. But compare *Gibson v. Vail*, 53 Vt. 476. And consult *Kahn v. Klabunde*, 50 Wis. 235, and cases therein cited.

12 2 *Schouler on Personal Property*, § 311, whence paragraph derived. And it makes no difference that the chattel after its return to the seller worked well under his management without alteration or repair: *Aiken v. Hyde*, 99 Mass. 183.

13 Nature of trial discussed: 2 *Corbin's Benjamin on Sales*, § 911, n. 27.

14 See *Elliott v. Thomas*, 3 Mees. & W. 170; *Langdell's Cases on Sales*, 145; *Lucy v. Mouffet*, 5 Hurl. & N. 229; 29 Law J. Ex. 110; *Bennett's Benjamin on Sales*, § 596; citing, also, *Okell v. Smith*, 1 Stark. 107. Pending trial, position of so-called buyer rather than of bailee than of full buyer: 2 *Schouler on Personal Property*, § 311; referring to *Hunt v. Wyman*, 100 Mass. 198; *Hartford Sorghum etc. Co. v. Brush*, 43 Vt. 528; *Story on Sales*, § 400.

§ 309. **Right to return goods.** — *Option to keep or to return.* There is a manifest distinction between an optional right in the party receiving goods to retain them if he liked them, and an optional right to return the same goods in whole or in part if he did not like them.<sup>1</sup> In the former case the title will not pass till the option is determined,<sup>2</sup> while in the latter it passes immediately to the party receiving the goods, subject to the right to rescind<sup>3</sup> and return.<sup>4</sup>

*Variation of alternative.* And the principle is the same in regard to the passing of title in the latter case, whether the alternative is to return specifically or in kind, or specifically, or to pay<sup>5</sup> a certain sum.<sup>6</sup>

*Similar transactions.* But there is a class of cases apparently very similar where a different result has been reached;<sup>7</sup> and in some of these cases the relation of the parties has been considered like that of consignor and consignee, or principal and agent;<sup>8</sup> while in others the controlling fact was the existence of a general custom, which by implication became a part of the contract, whereby it was understood that the title was to remain in the original owner.<sup>9</sup>

*Independent covenant and failure to return.* Where parties agreed to set up a printing-press in the office of a corporation, which was to have thirty days thereafter to determine whether or not it would keep the same, for a sum specified to be paid at certain dates, and such parties also agreed to keep the press in order permanently, without charge, it was held that the agreement to keep the press permanently in order was independent,<sup>10</sup> and that by keeping the press thirty days without electing to return the same, the corporation became liable for the purchase price.<sup>11</sup>

1 See *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582, 583; *Hunt v. Wyman*, 100 Mass. 200.

2 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345.

3 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345; referring to *Hunt v. Wyman*, 100 Mass. 198; Wharton on Contracts, 530.

4 *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582, 583, stating that the same distinction is recognized and applied in *Holbrook v. Armstrong*, 1 Fairf. 31; *Dearborn v. Turner*, 16 Me. 17; 33 Am. Dec. 630; *Perkins v. Douglass*, 20 Me. 317; and *Hunt v. Wyman*, 100 Mass. 200. And consult § 193, on SALE WITH CONDITION SUBSEQUENT.

5 See *Crocker v. Gullifer*, 44 Me. 393; 69 Am. Dec. 118.

6 *Buswell v. Bicknell*, 17 Me. 344; 35 Am. Dec. 267; as cited, *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582. And consult § 21, on PRIVILEGE OF RETURN.

7 See citations in succeeding notes. And consult note to *Elphick v. Barnes*, 20 Am. Law Reg. N. S. 244.

8 Hotchkiss v. Higgins, 52 Conn. 205 ; 52 Am. Rep. 582, 584.

9 Hotchkiss v. Higgins, 52 Conn. 205 ; 52 Am. Rep. 582, 584 ; referring to Meldrum v. Snow, 9 Pick. 441 ; 20 Am. Dec. 489.

10 Prairie Farmer Co. v. Taylor, 69 Ill. 440 ; 18 Am. Rep. 621, 622 ; citing, Thorpe v. Thorpe, 1 Salk. 171 ; Nelson v. Owen, 41 Ill. 73 ; White v. Gilman, 43 Ill. 502 ; Putnam v. Mellen, 34 N. H. 71.

11 Prairie Farmer Co. v. Taylor, 69 Ill. 440 ; 18 Am. Rep. 621.

§ 310. *Sale or return.*—*Status of title.* In the class of agreements usually termed “sale or return,”<sup>1</sup> the sale is a conditional<sup>2</sup> or defeasible one;<sup>3</sup> and the right of property in the goods passes to the purchaser, subject to be divested out of him and revested in the vendor,<sup>4</sup> by a return of the goods according to the terms of the contract.<sup>5</sup>

*Effect of failure to return.* Usually the condition is that the buyer may return the goods within a fixed or reasonable time, at his option;<sup>6</sup> and it has been held that the goods so sold pass subject to the option in him to return them,<sup>7</sup> and that if he fails to exercise the option within the proper time, the price of the goods may be recovered as upon an absolute sale.<sup>8</sup>

*Distinguished from similar agreements.* But a bargain of “sale or return,” in the strict sense, which is subject to a condition subsequent rendering the contract defeasible after delivery of the chattel,<sup>9</sup> is to be distinguished from a transaction which amounts to a mere bailment with the privilege of purchase;<sup>10</sup> while the contract which gives the option “to return” in words, generally seems rather to be subject to a condition precedent, and to be a contract for a sale on trial.<sup>11</sup>

*Exercise of privilege of return.* Whether the privilege of returning within a reasonable or the stated time has been duly exercised so as to terminate the sale, is a question of fact to be decided in accordance with the mutual understanding;<sup>12</sup> and where the seller refused to receive back a machine which failed to work as

represented, and which did not stand a further test then made on the seller's premises, the buyer was held justified in driving the machine into his yard, leaving it there, and notifying the seller to take it away.<sup>13</sup>

*Injury to chattel.* If the buyer materially impair the condition of the chattel by misuse or otherwise, while it is in his keeping, and is thus unable to place the seller *in statu quo*, he cannot in general take advantage of the condition under which it was delivered so as to rescind the contract;<sup>14</sup> but for an injury occasioned without the buyer's fault, as in the case of an animal taken under a bargain of "sale or return," the buyer has sometimes been held not to lose his privilege of return.<sup>15</sup>

1 Various applications of term: See 2 Schouler on Personal Property, § 312; referring to *Meldrum v. Snow*, 9 Pick. 441; 20 Am. Dec. 489; *In re Nevill*, Law R. 6 Ch. 397; Story on Sales, § 240. Subject discussed: 2 Corbin's Benjamin on Sales, p. 796, § 915, n. 30; 20 Am. Law Reg. N. S. 244.

2 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345.

3 *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582, 534; citing, Addison on Contracts (8th ed.), bk. 2, ch. 7, bottom p. 532.

4 See § 193, on SALE WITH CONDITION SUBSEQUENT.

5 *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582; citing, Addison on Contracts (8th ed.), bk. 2, ch. 7, bottom p. 532; and referring, also, to *Moss v. Sweet*, 3 Eng. L. & Eq. 311; *Schlesinger v. Stratton*, 9 R. I. 578; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Kinney v. Bradlee*, 117 Mass. 321; *Martin v. Adams*, 104 Mass. 262.

6 *Schlesinger v. Stratton*, 9 R. I. 578.

7 See citations in next note.

8 *Schlesinger v. Stratton*, 9 R. I. 578; as quoted, *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582, note at p. 536; referring to *Moss v. Sweet*, 3 Eng. L. & Eq. 311; 16 Q. B. 493; *Blanchi v. Nash*, 1 Mees. & W. 545; *Beverly v. Lincoln Gas Light & Coke Co.* 6 Ad. & E. 829.

9 See *Hickman v. Shimp*, 109 Pa. St. 16; 20 The Reporter, 345. Such an agreement may itself contain a condition precedent, as that of paying or securing the price before the title passes: See *Crocker v. Gullifer*, 44 Me. 431; 69 Am. Dec. 118.

10 See *Chamberlain v. Smith*, 44 Pa. St. 43; also, *Porter v. Petten-gill*, 12 N. H. 299.

11 2 Schouler on Personal Property, § 212, whence paragraph derived, here referring to *Elphick v. Barnes*, Law R. 5 C. P. D. 321; 30 Eng. Rep. 810; 20 Am. Law Reg. N. S. 240.

12 See *Gammon v. Abrams*, 53 Wis. 323; *Hinchcliffe v. Barwick*, Law R. 5 Ex. D. 177; 31 Eng. Rep. 628.

13 *Hall v. Aetna Manuf. Co.* 30 Iowa, 215. See 2 Schouler on Personal Property, § 312; referring, also, to *Padden v. Marsh*, 34 Iowa, 522.

14 See *Ray v. Thompson*, 12 Cush. 281; 59 Am. Dec. 187; also noted, 20 Am. Law Reg. N. S. 245.

15 See *Head v. Tattersall*, Law R. 7 Ex. 7; 1 Eng. Rep. 140; 2 Schouler on Personal Property, § 312, whence paragraph derived; referring, also, to *Hunt v. Wymann*, 100 Mass. 158. Death of horse taken upon an option, within time limited for return, without fault of buyer: See *Elphick v. Barnes*, Law R. 5 C. P. D. 321; 30 Eng. Rep. 810; 20 Am. Law Reg. N. S. 240. Consult further, Bennett's Benjamin on Sales, §§ 599, 599 a.

§ 311. **Sale of goods to arrive, etc.** — *In general.* A sale of goods "to arrive," or on arrival, has been stated to be a sale of goods expected from abroad, which is made before they arrive, upon the condition that the thing sold shall arrive, and that if it do not arrive, the bargain shall be void.<sup>1</sup> But the numerous English decisions upon this kind of contracts do not clearly settle when the language used therein shall amount to a condition precedent, or even then, what that condition shall be.<sup>2</sup>

*Double condition precedent.* In such cases two distinct stipulations are often, though not always, blended, namely, one as to the cargo being on the vessel in question, and the other, as to the safe arrival of that vessel, so that there may be set up, as a prerequisite of full performance under the contract, a double condition precedent, *first*, that the vessel shall arrive; and *second*, that on arrival, the subject-matter shall prove to be on board.<sup>3</sup>

*American views.* The tendency of the American cases is to regard the stipulation for arrival in a sale of goods "to arrive," whether it be by ocean or inland transportation, as conditional,<sup>4</sup> and the contract as executory, and not passing the title until the goods actually arrive,<sup>5</sup> so that the contract is at an end if the goods contracted for do not arrive, either from the vessel being lost, or other cause by accident, and without any fraud or fault of the vendor.<sup>6</sup>

*Notice of name of ship.* The condition also found in commercial sales of goods "to arrive," that the seller shall give notice of the name of the ship on which the goods are expected, as soon as he finds it out, must be strictly fulfilled as a condition precedent to the seller's right to enforce the bargain;<sup>1</sup> but by local usage, notice to the buyer's broker, with whom the contract was made, may constitute sufficient performance of the condition.<sup>8</sup>

1 Story on Sales, § 249; citing, *Shields v. Pettee*, 2 Sand. 262. Most usually this important class of modern mercantile contracts relates to specific goods, the shipment of which has been advised by mail-steamer or telegraph; *Campbell on Sales*, 255.

2 2 Schouler on Personal Property, § 314. See statements of decisions in *Bennett's Benjamin on Sales*, §§ 578-585; *Campbell on Sales*, 295, 296.

3 2 Schouler on Personal Property, § 314. Classification of English decisions on subject: *Bennett's Benjamin on Sales*, § 586. See *Boyd v. Siffkin*, 2 Camp. 326; *Ilde v. Thornton*, 3 Camp. 274; *Lovett v. Hamilton*, 5 Mees. & W. 639; *Johnson v. McDonald*, 9 Mees. & W. 690; *Simonds v. Braddon*, 2 Com. B. N. S. 324; *Gorriesen v. Perrin*, 2 Com. B. N. S. 681; *Hall v. Rawson*, 4 Com. B. N. S. 85; *Vernede v. Weber*, 1 Hurl. & N. 311; *Smith v. Myers*, Law R. 5 Q. B. 429; Law R. 7 Q. B. 139; 1 Eng. Rep. 42.

4 See citations in next note.

5 See *Benedict v. Field*, 16 N. Y. 595; *Neldon v. Smith*, 7 Vroom, 143; 2 Schouler on Personal Property, § 314, whence paragraph mainly derived.

6 *Neldon v. Smith*, 7 Vroom, 143. And consult Story on Sales, p. 231, § 249, n. 4; 2 Corbin's Benjamin, § 880, n. 29; citing, also, *Rogers v. Woodruff*, 23 Ohio St. 632; 13 Am. Rep. 276; *Dike v. Reitlinger*, 23 Hun, 241.

7 See *Buck v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Ex. 809; 11 Ex. 642; *Bennett's Benjamin on Sales*, § 588; and 2 Corbin's Benjamin on Sales, § 882; referring, also, to *Gilke v. Leonino*, 4 Com. B. N. S. 435.

8 See *Graves v. Legg*, 9 Ex. 709; 11 Ex. 642; 2 Schouler on Personal Property, § 324, whence paragraph largely derived; *Campbell on Sales*, 296.

§ 312. *Sale by sample or description.* — *Comparison of bulk with sample.* With regard to a sale by sample, it is frequently laid down in the courts of England and of many parts of this country, as a rule enforced for the buyer's protection and independent of usage, that there is an implied condition that the buyer shall have a fair

opportunity of comparing the bulk with the sample,<sup>1</sup> and that he may refuse to carry out the bargain if he is denied such opportunity.<sup>2</sup>

*Answering description or order.* So where a thing is sold by a particular description, the same authorities consider that there is a condition precedent implied that the thing which the seller delivers or tenders shall answer the description;<sup>3</sup> and so generally where the subject-matter of the sale is unascertained and the seller is to fulfill an order.<sup>4</sup>

*Engagement as condition rather than warranty.* The engagement in such cases is regarded not as a mere warranty or collateral stipulation,<sup>5</sup> but as a condition or integral part of the contract,<sup>6</sup> because the existence of the qualities agreed upon, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.<sup>7</sup>

*Different views.* But such an implied engagement on the part of the seller is often treated as a warranty,<sup>8</sup> while it is sometimes asserted that it is quite immaterial whether the buyer's action under a supply of goods not corresponding with the description shall be technically considered an action on a warranty, or an action for non-performance of a condition.<sup>9</sup>

*Need of performance of undertaking.* Yet despite the apparent confusion arising from the want of precision in the use of terms in this respect,<sup>10</sup> it is well settled that performance of the seller's stipulation, whether he be a dealer or a manufacturer,<sup>11</sup> is of the essence of the contract,<sup>12</sup> and that the buyer may refuse to perform his part of the bargain,<sup>13</sup> unless the seller who undertakes to supply a chattel of a particular kind or description<sup>14</sup> supplies accordingly.<sup>15</sup>

1 See citations in next note.

2 See *Lorymer v. Smith*, 1 Barn. & C. 1; *Grimoldby v. Wells*, Law R. 10 Com. P. 391; 12 Eng. Rep. 451; *Dutchess Co. v. Harding*, 49 N. Y. 321; as cited in support of text in 2 *Schouler on Personal Property*, § 316. And consult *Bennett's Benjamin on Sales*, § 594; *Campbell on Sales*, 305-307.

3 2 *Schouler on Personal Property*, § 316, whence paragraph derived. And see *Hedstrom v. Toronto Car Wheel*, 31 Up. Can. C. P. 425; as cited, 2 *Corbin's Benjamin on Sales*, § 918, n. 32. Consult, also, *Biddle on Chattel Warranties*, § 89.

4 See 2 *Smith's Lead. Cas.* 27.

5 Definition of warranty: *Neave v. Arntz*, 56 Wis. 174; *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280, 281; *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; 30 Alb. L. J. 490, 491. And see *Dorr v. Fisher*, 1 Cush. 273; *Harley v. Iron Works*, 66 Cal. 233; 19 The Reporter, 100; *Cary v. Gruman*, 4 Hill, 626; *McFarland v. Newman*, 9 Watts, 55; 44 Am. Dec. 497, 499.

6 Warranty and condition distinguished: *Dorr v. Fisher*, 1 Cush. 273. But see *Boardman v. Spooner*, 13 Allen, 361; *Langdell's Cases on Sales*, 610.

7 2 *Smith's Lead. Cas.* 127. And see *Chanter v. Hopkins*, 4 Mees. & W. 399; *Bennett's Benjamin on Sales*, § 600; *Campbell on Sales*, 301, 302. Compare *Story on Sales*, § 377. Thus even if the bulk actually correspond with the sample, yet the purchaser is not bound to receive the goods tendered if they fail to answer a certain description further incorporated in the contract: See *Nichols v. Godts*, 10 Ex. 1 ("foreign refined rape oil"); *Bannerman v. White*, 10 Com. B. N. S. 844 (hops not sulphur grown); *Azemar v. Casella*, Law R. 2 Com. P. 431-477; 36 Law J. Com. P. 124 (long-stapled Salem cotton); also, *Dutchess Co. v. Harding*, 49 N. Y. 321; *Carson v. Baillie*, 19 Pa. St. 375; 57 Am. Dec. 659; *Pennock v. Stygles*, 54 Vt. 223; *Woods v. Miller*, 55 Iowa, 168 ("early rose potatoes"). So the bargain for a book or map according to a certain prospectus, is held not to be binding upon the subscriber where the thing when offered proves so materially different as to inherent qualities from that set forth in the prospectus, that it is not the specific thing which was agreed upon: See *Paton v. Duncan*, 3 Car. & P. 336. Basis of paragraph: 2 *Schouler on Personal Property*, §§ 316, 317.

8 See *Hogins v. Plympton*, 11 Pick. 99, 100; *Henshaw v. Robins*, 9 Met. 87; 43 Am. Dec. 367; *Story on Sales*, § 553.

9 *Wolcott v. Mount*, 36 N. J. L. 262, 266; 13 Am. Rep. 447. And see *Bannerman v. White*, 10 Com. B. N. S. 844; *Bennett's Benjamin on Sales*, § 600, n. p; 2 *Corbin's Benjamin on Sales*, § 918, n. 32; 2 *Schouler on Personal Property*, § 316; *Biddle on Chattel Warranties*, §§ 103-105.

10 See *Bannerman v. White*, 10 Com. B. N. S. 844; 31 Law J. Com. P. 28.

11 Undertaking that goods of party's own manufacture: See *Johnson v. Raylton*, Law R. 7 Q. B. D. 438. And consult *Biddle on Chattel Warranties*, §§ 138-140.

12 See citations in succeeding notes. And see *Campbell on Sales*, 300.

13 See *Wolcott v. Mount*, 36 N. J. L. 262, 266; 13 Am. Rep. 447.

14 See *Winsor v. Lombard*, 18 Pick. 6.

15 2 *Schouler on Personal Property*, § 316. And the buyer's right so universally conceded to refuse performance, or as it is sometimes



phrased, to repudiate the contract, for the non-conformity of the article delivered to the description under which it was sold, is founded on the seller's engagement, by such description, that the article sold shall correspond with the description : 2 Schouler on Personal Property, § 316; citing, *Nichols v. Godts*, 10 Ex. 151; *Bannerman v. White*, 10 Com. B. N. S. 844; *Azemar v. Casella*, Law R. 2 Com. P. 431; *Josling v. Kingsford*, 13 Com. B. N. S. 447; *Bennett's Benjamin on Sales*, §§ 600-605; *Henshaw v. Robins*, 9 Met. 87; 43 Am. Dec. 367; *Borrekens v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85; *Hawkins v. Pemberton*, 51 N. Y. 324; 10 Am. Rep. 595; *Wolcott v. Mount*, 36 N. J. L. 232; 13 Am. Rep. 447; *Beals v. Olmstead*, 24 Vt. 114; 53 Am. Dec. 150; *Cason v. Baillie*, 19 Pa. St. 375; 57 Am. Dec. 659; *Dounce v. Dow*, 60 N. Y. 411.

§ 313. **Genuine character of securities.**—*Seller's obligation concerning.* The vendor who sells promissory notes, bills of exchange, bonds, stocks, or any negotiable instruments or commercial securities of an incorporeal character, is bound to deliver that which is genuine,<sup>1</sup> and not that which is false, counterfeit, or not marketable, by the name or denomination used in describing it.<sup>2</sup>

*Condition or warranty.* In England, this obligation of the seller to deliver genuine securities is regarded as a condition precedent, forming part of the principal contract itself, and not as a mere collateral stipulation or warranty;<sup>3</sup> but many of the American cases treat such obligation as founded on an implied warranty.<sup>4</sup>

*Effect of non-compliance.* Yet it is generally admitted that the effect of the seller's failure to perform his obligation in this respect is to authorize the buyer to repudiate the contract entirely,<sup>5</sup> and to recover back the purchase money, if it is already paid, or to refuse to take and pay for the spurious thing when it is tendered for acceptance.<sup>6</sup>

<sup>1</sup> See citations in next note. And see *Biddle on Chattel Warranties*, § 131.

<sup>2</sup> See *Bennett's Benjamin on Sales*, § 607; 2 *Corbin's Benjamin on Sales*, § 924; *Campbell on Sales*, 307; 2 *Schouler on Personal Property*, § 318; citing, *Young v. Cole*, 3 Bing. N. C. 724; *Gompertz v. Bartlett*, 2 El. & B. 849; *Westropp v. Solomon*, 8 Com. B. 345; *Aldrich v. Jackson*, 5 R. I. 218; *Ledwich v. McKim*, 53 N. Y. 307; *Wood v. Sheldon*, 42 N. J. L. 421; 36 Am. Rep. 523; *Donaldson v. Newman*, 9 Mo. App. 235; *Merriam v. Wolcott*, 3 Allen, 258; 80 Am. Dec. 69.

3 See English authorities cited in last note.

4 See American authorities cited in note before last. And consult Story on Sales, § 367 *i*; 2 Corbin's Benjamin on Sales, § 924, n. 36; quoting *Swanzy v. Parker*, 50 Pa. St. 441, 450. On sale of accounts implied warranty that they are genuine: *Gilchrist v. Hilliard*, 53 Vt. 592; 38 Am. Rep. 706.

5 See citations in next note. Right of repudiation doubly sure if seller guilty of fraud: *Bell v. Cafferty*, 21 Ind. 411. And see *Webb v. Odell*, 49 N. Y. 583.

6 2 Schouler on Personal Property, § 318. And see *Campbell on Sales*, 307; *Jones v. Ryder*, 5 Taunt. 578; *Young v. Cole*, 3 Ring. N. C. 724; *Westropp v. Solomon*, 8 Com. B. 345; *Gompertz v. Bartlett*, 2 El. & B. 849; 23 Law J. Q. B. 65.

§ 314. **Failure to furnish stipulated securities.**— *When there is a failure of consideration.* The condition or warranty imposed upon the seller of negotiable or incorporeal securities is unfulfilled wherever the thing delivered is not the genuine thing bargained for,<sup>1</sup> and the material consideration of the sale fails<sup>2</sup> of effect;<sup>3</sup> as where the instrument is false, forged, counterfeit, or otherwise invalid;<sup>4</sup> or where foreign bonds, seemingly good, turned out to have become unmarketable because repudiated by the government of the State under whose authority they purported to have been issued;<sup>5</sup> or where names signed or indorsed upon negotiable paper prove to have been forged.<sup>6</sup>

*Thing not entirely worthless.* And even though the thing sold be not entirely worthless, as where one good indorsement on a note proves genuine, though the other signatures were forged,<sup>7</sup> the general rule still applies, and the contract fails for lack of consideration.<sup>8</sup>

*Getting intended subject-matter.* But it is a question for the jury whether the thing delivered be what was really intended by both parties as the subject-matter of the sale, although not very accurately described;<sup>9</sup> and if such be the case, the seller fulfills his obligation by delivering or tendering it.<sup>10</sup>

*Features not covered.* Nor does the seller's obligation extend beyond the genuine character of the in-

strument so as to cover the solvency of any party thereto.<sup>11</sup>

1 See citations in succeeding notes.

2 Failure of consideration generally: See subsequent chapter on that subject.

3 2 Schouler on Personal Property, § 318, whence paragraph largely derived. And see Campbell on Sales, 307.

4 See *Jones v. Ryder*, 5 Taunt. 488; *Gompertz v. Bartlett*, 2 El. & B. 849; *Wood v. Sheldon*, 13 Vroom, 421; 36 Am. Rep. 523.

5 See *Young v. Cole*, 3 Bing. N. C. 724.

6 See *Gurney v. Smith*, 4 El. & B. 133; *Aldrich v. Jackson*, 5 R. I. 218; *Dumont v. Williamson*, 18 Ohio St. 215; *Terry v. Bissell*, 26 Conn. 23; *Ledwich v. McKim*, 53 N. Y. 307; *Worthington v. Cowles*, 112 Mass. 30; *Ward v. Haggard*, 75 Ind. 281; *Cabot Bank v. Morton*, 4 Gray, 156. *Contra*, *Baxter v. Duren*, 19 Me. 434; doubted in *Hussey v. Sibley*, 66 Me. 192. Consult, also, Bennett's Benjamin on Sales, § 607, n. e.

7 See *Gurney v. Womersley*, 4 El. & B. 133; 24 Law J. Q. B. 46.

8 2 Schouler on Personal Property, § 318. And see Bennett's Benjamin on Sales, § 608, n. n; referring, also, to *Woodland v. Fear*, 7 El. & B. 519; 26 Law J. Q. B. 202; and to *Kennedy v. Panama etc. Mail Co.* Law R. 2 Q. B. 587.

9 See *Mitchell v. Newhall*, 15 Mees. & W. 308; *Lamert v. Heath*, 15 Mees. & W. 487; Bennett's Benjamin on Sales, § 609; 2 Corbin's Benjamin on Sales, § 927, n. 37; also stating *Edwards v. Marcy*, 2 Allen, 436; *Charnley v. Dulles*, 8 Watts & S. 353; and *Porter v. Bright*, 82 Pa. St. 441.

10 2 Schouler on Personal Property, § 318.

11 See *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225; 2 Schouler on Personal Property, 318, whence paragraph derived. And consult 2 Corbin's Benjamin on Sales, § 924, n. 36; Bennett's Benjamin on Sales, § 607, n. e; citing, also, *Beckwith v. Farnum*, 5 R. I. 230. Similar views concerning promissory note void for usury (*Littauer v. Goldman*, 72 N. Y. 506; 23 Am. Rep. 171); and stock fraudulently over-issued: *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Lamert v. Heath*, 15 Mees. & W. 487.

## CHAPTER XXII.

### WARRANTY IN GENERAL.

- § 315. In general.
- § 316. Kinds.
- § 317. Form and requisites.
- § 318. Expressions of opinion, etc.
- § 319. Warranties by agents.
- § 320. Patent defects.
- § 321. Soundness or other qualities of animals.
- § 322. Qualified or conditional warranty.
- § 323. Notice of defects.

§ 315. In general. — *Definition.* A warranty is an express or implied statement of a matter which a party to a contract undertakes shall be part of the same, though collateral to its immediate object.<sup>1</sup> Yet strictly speaking, though it is a concomitant, it is also a collateral, self-existent contract, and no more a part of the sale than a covenant in a deed is a part of the conveyance.<sup>2</sup>

*Distinguished from condition.* Nor is it strictly a condition, since it neither suspends nor defeats the completion of the sale, the vesting of the thing sold, nor the right to the purchase money;<sup>3</sup> though a warranty is sometimes treated as a condition subsequent, to avoid circuity of action.<sup>4</sup>

*Distinguished from fraud.* Warranty differs from fraud in not necessarily involving knowledge or indifference concerning the correctness of the representation;<sup>5</sup> but a warranty may also be a fraud if its falsity be known to the party giving it.<sup>6</sup>

*Oral or written.* It may be oral or in writing,<sup>7</sup> and need not be written, where the sale itself satisfies the statute of frauds;<sup>8</sup> but its distinct embodiment in a

document which is more than an informal memorandum or receipt, or its omission therefrom, excludes oral evidence of its existence or terms.<sup>9</sup>

*On executory contract.* There may be a valid warranty when the contract is executory as well as when it is executed;<sup>10</sup> though it has been inaccurately declared that a warranty is an incident only of consummated or completed sales, and has no immediate efficacy in an executory agreement for a sale.<sup>11</sup>

1 See *Neave v. Arntz*, 56 Wls. 174; quoting, *Chanter v. Hopkins*, 4 Mees. & W. 404. And consult *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280, 281; *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; 30 Alb. L. J. 490, 491; note to *Reynolds v. Palmer*, 21 Fed. Rep. 439. Warranty in sales: *Dorr v. Fisher*, 1 Cush. 273. And see *Harley v. Iron Works*, 66 Cal. 238; 19 The Reporter, 109. Warranty on sale of chattel: *Cary v. Gruman*, 4 Hill, 626. Effect of custom or usage, and waiver of warranty: 2 Schouler on Personal Property, §§ 326, 327.

2 *McFarland v. Newman*, 9 Watts, 55; 34 Am. Dec. 497, 499.

3 *Dorr v. Fisher*, 1 Cush. 273; as cited, *Biddle on Chattel Warranties*, p. 5, § 4. Representations in general discussed: *Campbell on Sales*, 320.

4 See *Boardman v. Spooner*, 13 Allen, 361; *Langdell's Cases on Sales*, 610; *Morse v. Brackett*, 98 Mass. 209; *Dorr v. Fisher*, 1 Cush. 273; *Bennett's Benjamin on Sales*, p. 1037, § 888, n. a, so citing these cases. Qualified or conditional warranty: See § 322, on that subject.

5 See *Bennett's Benjamin on Sales*, p. 636, § 561, and p. 1059, § 904, n. n; *Waterbury v. Russell*, 8 Baxt. 159; *Clark v. Bamer*, 2 Lans. 67.

6 *Hughes v. Funston*, 23 Iowa, 257. Compare *Sherman v. Johnson*, 56 Barb. 59. But see *Rose v. Hurley*, 39 Ind. 77.

7 *Lindsay v. Davis*, 30 Mo. 406, 410; *Milk v. Rich*, 15 Hun, 518. Oral merged in written: *Brown v. Russell*, 4 N. E. Rep. (Ind.) 428.

8 *Northwood v. Rennie*, 28 Up. Can. C. P. 202; 3 Ont. App. 37. And see *Lamb v. Crafts*, 12 Met. 353; *Whitney v. Webster*, 58 Ind. 253. But compare *Peltier v. Collins*, 3 Wend. 459; 20 Am. Dec. 711; *Langdell's Cases on Sales*, 548; *Boardman v. Spooner*, 13 Allen, 353; *Langdell's Cases on Sales*, 610; *Nichols v. Nordheimer*, 22 Up. Can. C. P. 48; *Frost v. Blanchard*, 97 Mass. 155.

9 2 Schouler on Personal Property, § 336, and cases cited. And see *Campbell on Sales*, 321; *Johnson v. Powers*, 65 Cal. 179; *Briggs v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Mast v. Pearce*, 58 Iowa, 575; 43 Am. Rep. 125.

10 *Polhemus v. Heiman*, 45 Cal. 573, 579; *Day v. Pool*, 52 N. Y. 416; 11 Am. Rep. 719; *Parks v. Morris etc. Co.* 54 N. Y. 536; *Brigg v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Kent v. Friedman*, 3 N. E. Rep. (N. Y.) 905; *Maxwell v. Lee*, 27 N. W. Rep. (Minn.) 196; 21 The Reporter, 727. And see 2 Schouler on Personal Property, § 323; *Gibson v. Stevens*, 8 How. 384. Compare *Foot v. Bentley*, 44 N. Y. 166; 4 Am. Rep. 652.

11 *Osborn v. Gantz*, 60 N. Y. 540. And see 2 Smith's Lead. Cas. 33; *Harley v. Iron Works*, 66 Cal. 238; 19 The Reporter, 109.

§ 316. *Kinds.—Express and implied.* A warranty may be express or implied.<sup>1</sup> Express warranty arises where one party to a contract of sale specially undertakes to make sure to the other that the thing sold is as represented;<sup>2</sup> but an implied warranty is a guaranty which the law deduces as an inevitable consequence of the contract, even if there has been no special undertaking in the matter.<sup>3</sup> An express warranty may exclude any implied warranty;<sup>4</sup> and an implied warranty will not cover unforeseen contingencies.<sup>5</sup>

*Warranty of title.* In this country there is an implied warranty of title from the mere sale of a chattel, at least if it be in the seller's possession;<sup>6</sup> and in England the tendency of the recent cases has been considered to decidedly favor an implied affirmation of ownership, unless the transfer is merely of the seller's interest.<sup>7</sup>

*Warranty of quality.* In the absence of fraud<sup>8</sup> or express warranty,<sup>9</sup> the common-law rule,<sup>10</sup> under the maxim *caveat emptor*, which throws all risks of quality upon the purchaser of a specific chattel,<sup>11</sup> is that the seller of personal property is subject to no implication of a warranty of quality;<sup>12</sup> but the exceptions to the rule are extended to admit various warranties implied from the nature and circumstances of the sale, as those of correspondence with sample or description, fitness for particular purposes, merchantable character, against latent defects, etc.<sup>13</sup>

1 See *Neave v. Arntz*, 56 Wis. 174; *Osgood v. Lewis*, 2 Har. & G. 495; 18 Am. Dec. 317, 318; *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85.

2 See citations in next note. In express warranties there is a direct stipulation, or something equivalent to it: *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85.

3 2 Schouler on Personal Property, § 328. And see 2 Bouvier Law Dict. (14th ed.) 652; Biddle on Chattel Warranties, p. 3, § 3; quoting, *Ottis v. Alderson*, 10 Smedes & M. 476, 481; *Osgood v. Lewis*, 2 Har. & G. 495; 18 Am. Dec. 317, making classification. Inference of warranty from words, acts, and circumstances: 2 Schouler on Personal Property, §§ 337, 343; *Terhune v. Dever*, 36 Ga. 648. Implied warranties

are conclusions and inferences of law, from facts which are admitted or proved before the jury: *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85.

4 See *McGraw v. Fletcher*, 35 Mich. 104; *Jackson v. Langston*, 61 Ga. 392; *Lainer v. Auld*, 1 Murph. 138; 3 Am. Dec. 680. But compare *Houston v. Gilbert*, 3 Brev. 63; 5 Am. Dec. 542; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626, 633. Express warranty, in writing, intent, evidence, uncertain expressions, etc.: 2 Schouler on Personal Property, §§ 335-337. Rules of construction: *Campbell on Sales*, 322.

5 See *Mann v. Everston*, 32 Ind. 355.

6 See *Whitney v. Heywood*, 6 Cush. 86; *Scranton v. Clark*, 39 N. Y. 220; *Long v. Hickingbotham*, 28 Miss. 772; *Fletcher v. Drath*, 66 Mo. 126; 2 Kent Com. 478; *Story on Sales*, § 367; 2 Schouler on Personal Property, § 378; *Biddle on Chattel Warranties*, §§ 236-243; quoting, *Byrnside v. Burdett*, 15 W. Va. 502; *People's Bank v. Kurtz*, 90 Pa. St. 344; 44 Am. Rep. 192; *Shattuck v. Green*, 104 Mass. 45. And consult note to *Scott v. Hix*, 2 Sneed, 192; 62 Am. Dec. 463-465; note to *Reynolds v. Palmer*, 21 Fed. Rep. 457; *Johnson v. Powers*, 65 Cal. 179; *Baker v. McAllister*, 3 Pac. Rep. (Wash. T.) 581.

7 See *Eichholz v. Bannister*, 17 Com. B. N. S. 708; *Chapman v. Speller*, 14 Q. B. 621; *Bennett's Benjamin on Sales*, § 639; *Campbell on Sales*, 323; *Biddle on Chattel Warranties*, §§ 232, 233; note to *Reynolds v. Palmer*, 21 Fed. Rep. 456; note to *Scott v. Hix*, 62 Am. Dec. 460. And consult *Page v. Cowasjee*, Law R. 1 P. C. 127; *Bagneley v. Hawley*, Law R. 2 Com. P. 625. Compare *Sims v. Marryat*, 17 Q. B. 281; *Morley v. Attenborough*, 3 Ex. 500. Canadian views: See *Brown v. Cockburn*, 37 Up. Can. Q. B. 598, reviewing English authorities; *Somers v. O'Donohue*, 9 Up. Can. C. P. 208; *Biddle on Chattel Warranties*, §§ 234, 235; note to *Scott v. Hix*, 62 Am. Dec. 463.

2 See *Irving v. Thomas*, 18 Me. 418; *Ottis v. Alderson*, 10 Smedes & M. 476.

9 See *Warren v. Phila. Coal Co.* 83 Pa. St. 437.

10 See *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253, fully discussing subject.

11 See *Bowman v. Clemmer*, 50 Ind. 10.

12 See *Warren v. Phila. Coal Co.* 83 Pa. St. 437; 2 Schouler on Personal Property, §§ 322, 346; *Story on Sales*, § 349.

13 See *Jones v. Just*, Law R. 3 Q. B. 177; *Ottis v. Alderson*, 10 Smedes & M. 476, 481; *French v. Vining*, 102 Mass. 155; *Bryant v. Pember*, 45 Vt. 487; *Bowman v. Clemmer*, 50 Ind. 10; *Bennett's Benjamin on Sales*, § 644; 2 Schouler on Personal Property, §§ 322, 343; *Biddle on Chattel Warranties*, p. 3, § 3.

### § 317. Form and requisites.—*Affirmation and intention.*

An affirmation at the time of sale is a warranty, provided it appears in evidence to be so intended.<sup>1</sup> And the rule of law laid down by all the authorities is said to be that any affirmation of the quality of the article, made at the time of the sale, intended as an assurance of the fact stated, and relied on and acted on by the purchaser, will constitute an express warranty.<sup>2</sup>

*Mode of expression.* No particular form of words is necessary to constitute an express warranty, and the word "warrant,"<sup>3</sup> though customarily employed, need not be used<sup>4</sup> at all.<sup>5</sup>

*Time of making, and operation.* A warranty need not be made at the time the sale is concluded, but may consist of prior statements of sufficient scope, if incorporated in the bargain, or may be made after the sale, if upon a new consideration, and it may cover a future event.<sup>6</sup>

1 Potomac etc. Co. v. Harlan etc. Co. 4 Atl. Rep. (Md.) 903; citing, Gross v. Gardner, 3 Mod. 261; Pasley v. Freeman, 3 Term Rep. 57; Osgood v. Lewis, 2 Har. & G. 518; 18 Am. Dec. 317. And see Mason v. Chappell, 15 Gratt. 572; Figge v. Hill, 61 Iowa, 430, 432; Halliday v. Briggs, 15 Neb. 219, 222, 223.

2 Crenshaw v. Slye, 52 Md. 146; as cited, Potomac etc. Co. v. Harlan etc. Co. 4 Atl. Rep. (Md.) 903. And see Story on Sales, § 357; Mason v. Chappell, 15 Gratt. 572; Biddle on Chattel Warranties, p. 37, § 35, and p. 38, § 36; quoting, Henshaw v. Robins, 9 Met. 83; 43 Am. Dec. 367.

3 See Warren v. Philadelphia Coal Co. 83 Pa. St. 440.

4 See Henshaw v. Robins, 9 Met. 83; 43 Am. Dec. 367.

5 2 Schouler on Personal Property, § 331; citing Callanan v. Brown, 31 Iowa, 333. And see Towell v. Gatewood, 2 Scam. 67; 33 Am. Dec. 437, 440; 1 Parsons on Contracts, 463; Story on Sales, § 357; Biddle on Chattel Warranties, p. 37, § 35, and p. 38, § 36; Neave v. Arntz, 56 Wis. 174, 176; Gregory v. Underhill, 6 Lea, 207, 210; West Republic Mg. Co. v. Jones, 108 Pa. St. 55; 19 The Reporter, 271; Warder v. Bowen, 31 Minn. 335, 336.

6 See Willmot v. Hurd, 11 Wend. 534; Driesbach v. Lewisburg Bridge Co. 81 Pa. St. 177; Congar v. Chamberlain, 14 Wis. 233; as cited, 2 Schouler on Personal Property, § 332. Consult, also, Biddle on Chattel Warranties, §§ 37-42. And compare Gregory v. Underhill, 6 Lea, 207-212, Baldwin v. Daniel, 69 Ga. 732, 791; Hoult v. Baldwin, 67 Cal. 610; 8 Pac. Rep. 440. Continuance of warranty: See Chapman v. Gwyther, Law R. 1 Q. B. 463; Craig v. Miller, 22 Up. Can. C. P. 343; Bristol v. Tracy, 21 Barb. 236.

§ 318. Expressions of opinion, etc.—*Distinguished from assertions of fact.* There is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used as indications of opinion.<sup>1</sup> And in order to create a warranty, the seller must essentially assert a fact upon which he is especially informed, and the buyer is ignorant, and not merely



state an opinion<sup>2</sup> upon a matter wherein the buyer should exercise his own judgment.<sup>3</sup>

*Dealer's talk, etc.* Hence, warranties do not arise from the simple commendation of the articles sold,<sup>4</sup> or vague assertions as to their value, quality, goodness, soundness, etc., or other exaggerated oral statements or recommendations, often classed as "dealer's talk," and deemed to amount to no more than representations of the worth, condition, or characteristics of the articles.<sup>5</sup>

*Province of court and jury* In general, when the evidence is such as to leave no doubt of the legal force of the language of the representation, the court may and should declare its effect;<sup>6</sup> but otherwise it should be left to the jury to determine.<sup>7</sup>

1 Reed v. Hastings, 61 Ill. 266. And see Mason v. Chappell, 15 Gratt. 572.

2 Use of word "choice" discussed: Reynolds v. Palmer, 21 Fed. Rep. 433, 435; Forcheimer v. Stewart, 65 Iowa, 594; 54 Am. Rep. 30.

3 See Tabor v. Peters, 74 Ala. 90; 49 Am. Rep. 804, 805, 806, discussing distinction; Reed v. Hastings, 61 Ill. 266; Hawkins v. Pemberton, 51 N. Y. 198; 10 Am. Rep. 595; Bennett's Benjamin on Sales, § 613; Mason v. Chappell, 115 Gratt. 572; as quoted, Biddle on Chattel Warranties, § 44; Towell v. Gatewood, 2 Scam. 22; 33 Am. Dec. 437, 440; Bartlett v. Hoppock, 34 N. Y. 118; 88 Am. Dec. 428, 429; Halliday v. Briggs, 15 Neb. 219, 221; Linn v. Gunn, 23 N. W. Rep. (Mich.) 84.

4 See Forcheimer v. Stewart, 65 Iowa, 594; 54 Am. Rep. 30; Tabor v. Peters, 74 Ala. 90; 49 Am. Rep. 804, 805; Reynolds v. Palmer, 21 Fed. Rep. 433, 435.

5 See 2 Schouler on Personal Property, § 329, and cases cited; Story on Sales, §§ 360, 360 b; Halliday v. Briggs, 15 Neb. 219, 220, 222; 2 Corbin's Benjamin on Sales, § 933, n.; Tewksbury v. Bennett, 31 Iowa, 83; McGrew v. Forsythe, 31 Iowa, 179; Byrne v. Jansen, 50 Cal. 624; Fauntleroy v. Wilcox, 80 Ill. 477; Mason v. Chappell, 15 Gratt. 572; Hogs v. Plympton, 11 Pick. 97; Reynolds v. Palmer, 21 Fed. Rep. 433, 435.

6 Halliday v. Briggs, 15 Neb. 219, 223, whence paragraph derived. And consult Biddle on Chattel Warranties, §§ 83, 84.

7 See Whitney v. Sutton, 10 Wend. 412; Tuttle v. Brown, 4 Gray, 457; 64 Am. Dec. 80; Morrill v. Wallace, 9 N. H. 111.

§ 319. *Warranties by agents.*—*Authority from custom.* As an agent to sell is presumed to have authority to do whatever is usual in the course of the business, he may

expressly warrant,<sup>1</sup> if it be the custom of a seller to do so in like circumstances.<sup>2</sup>

*Warranties implied from mode of sale.* And every warranty which the law necessarily implies from a particular mode of sale, as of correspondence of bulk with sample,<sup>3</sup> or of quality of goods supplied to order,<sup>4</sup> comes, as a component part of the sale, within the authority to make the sale.<sup>5</sup>

*Warranties by special agents.* But an agent whose powers are special or restricted cannot bind his principal by an express warranty for which he is unable to show clear authority;<sup>6</sup> and this limitation applies so as to invalidate a warranty given by an auctioneer, sheriff, or any mere broker;<sup>7</sup> or by the servant or employee of a private owner of a horse,<sup>8</sup> as distinguished from the agent of a general horse dealer, who has implied authority to bind his principal by a warranty, though secretly instructed not to warrant.<sup>9</sup>

*Oral and written warranty.* Where an agent selling goods for his principal orally warrants their quality for himself, and as agent procures the making of a contract of purchase in writing, containing a warranty of his principal, the former warranty is not merged in the latter, but is a separate contract, binding the agent personally, and admissible in evidence in an action on one of the price notes made payable to the agent.<sup>10</sup>

1 Evidence of authority to warrant durability: *Smilie v. Hobbs*, 5 Atl. Rep. (N. H.) 711.

2 2 Schouier on Personal Property, § 324; citing, *Brady v. Todd*, 9 Com. B. N. S. 592; *Dingle v. Hare*, 7 Com. B. N. S. 145; *Howard v. Sheward*, Law R. 2 Com. P. 148; *Bryant v. Moore*, 26 Me. 84; 45 Am. Dec. 96; *Randall v. Kehler*, 60 Me. 37; 11 Am. Rep. 169; *Williamson v. Connaday*, 3 Ired. 349; *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Boothby v. Scales*, 27 Wis. 626; *Story on Agency*, §§ 102, 443; *Bennett's Benjamin on Sales*, § 624; *Story on Sales*, § 350. And consult *Biddle on Chattel Warranties*, § 15; 2 *Corbin's Benjamin on Sales*, § 945, n. 16; citing, *Herring v. Skaggs*, 62 Ala. 180, 185; 34 Am. Rep. 4.

3 See *Andrews v. Kneeland*, 6 Cowen, 354; *Schuchardt v. Allen*, 1 Wall. 359.

4 See *Boothby v. Scales*, 27 Wis. 626.

5 2 Schouler on Personal Property, § 324; citing, also, *Upton v. Suffolk County Mills*, 11 Cush. 586; 59 Am. Dec. 163; Story on Agency, § 102; *Palmer v. Hatch*, 46 Mo. 585. And consult Story on Sales, § 350, p. 403, n. 3; *Cooley v. Perrine*, 41 N. J. L. 322; 32 Am. Rep. 210.

6 2 Schouler on Personal Property, § 324. And see *Biddle on Chattel Warranties*, § 15; Story on Sales, § 350; *Decker v. Fredericks*, 47 N. J. L. 469. Compare *Deming v. Chase*, 48 Vt. 382.

7 See *Bartholomew v. Warner*, 32 Conn. 98; *Blood v. French*, 9 Gray, 197; *Dodd v. Farlow*, 11 Allen, 426; *The Monte Allegre*, 9 Wheat. 644; *Mink v. Jarvis*, 8 Up. Can. Q. B. 397; 13 Up. Can. Q. B. 84.

8 See *Brady v. Todd*, 9 Com. B. N. S. 592; *Cooley v. Perrine*, 41 N. J. L. 322; 32 Am. Rep. 210; S. C. 42 N. J. L. 623; *Wilcox v. Henderson*, 64 Ala. 555; *Hugueley v. Norris*, 65 Ga. 666; *Meister v. The Cleveland Dryer Co.* 11 Ill. App. 227; *Bennett's Benjamin on Sales*, § 675; *Campbell on Sales*, 324. Otherwise in England if sold at a fair: *Brooks v. Hassall*, 49 L. T. N. S. 569. And see 18 Cent. L. J. 223.

9 *Howard v. Sheward*, Law R. 2 Com. P. 148. And see *Bryant v. Moore*, 26 Me. 84, 87; 45 Am. Dec. 96.

10 *Shordan v. Kyler*, 87 Ind. 38.

§ 320. *Patent defects.*—*Known or patent defects* A general warranty does not ordinarily include defects which are known to the buyer, or patent defects which are apparent upon mere inspection, and demand no special skill for their discovery.<sup>1</sup> And it has even been held that where a fire-engine is warranted to be as efficacious for all the purposes of such an apparatus as any in a specified section of the country, there is no breach of warranty if it is inferior to others larger and more costly, where such inferiority is patent to every ordinary observer.<sup>2</sup>

*Need of skill, etc.* But it seems to be now well settled that the rule of law which exempts a seller from liability upon a general warranty, like that of soundness, where the defect is known or perfectly visible and obvious to the unaided senses, does not extend to an apparent defect whose true nature and extent can be determined only with the aid of skill, experience, or judgment.<sup>3</sup>

*Artifice to conceal defects, etc.* Nor must the seller claiming exemption have resorted to artifice to conceal

the defects, or to throw the purchaser off his guard and arrest thorough examination.<sup>1</sup>

*Covering patent defects.* So the warranty may be framed in such a way as to insure against a patent defect as well as against one not manifest.<sup>5</sup> And where the seller of a kiln of brick warranted them "to be good brick and all right," and it turned out that some of the bricks beneath the exterior were imperfectly burned, but that the "cold spot" where this was the case could not have been discovered by the buyer without going on top of the kiln and removing the bricks therefrom, it was held that the buyer could rely upon the warranty as the basis of a counter-claim for damages in an action on the price note.<sup>6</sup>

*Liability for latent defects.* But to render the seller liable for latent defects unknown to him in a specific thing sold, there should be clear evidence of an express warranty on his part.<sup>7</sup>

*Patent churn.* Where on the sale of a patent right to a churn, manufactured by the seller, he exhibited a sample churn, which was inspected by one of the buyers, and stated that it would produce butter in from one to five minutes, that it could be operated by a child five or six years old, that it was made of juniper-wood, and that the dasher was nickel-plated, whereas in fact it would not produce butter in less than ten minutes, was too heavy for children to work it, and was made of white ash, painted, while the dasher was of polished iron, it was held that the representations made amounted to a warranty,<sup>8</sup> and that the court could not pronounce the discrepancies so plain and obvious on inspection that they were not covered by the warranty given by the manufacturer.<sup>9</sup>

1 See *Pinney v. Andrus*, 41 Vt. 631; *Gaylord Man. Co. v. Allen*, 53 N. Y. 515; *McCormick v. Kelly*, 28 Minn. 135; *Vandewalker v. Osmer*, 65 Barb. 556, 561; *Fox v. Emerson*, 27 Hun, 355; *Schuyler v.*

Russ, 2 Caines, 202 ; 2 Schouler on Personal Property, § 333 ; Story on Sales, § 354 ; Bennett's Benjamin on Sales, § 616, 2 Corbin's Benjamin on Sales, § 938 ; Biddle on Chattel Warranties, §§ 79, 80. Consult, further, Tabor v. Peters, 74 Ala. 90 ; 49 Am. Rep. 804, 807, 808. And compare Vates v. Cornelius, 69 Wis. 615 ; Meckley v. Parsons, 66 Iowa, 63 ; 55 Am. Rep. 261, 262.

2 President etc. v. Wadleigh, 7 Blackf. 102 ; 41 Am. Dec. 214.

3 See Pinney v. Andrus, 41 Vt. 631 ; Brown v. Bigelow, 10 Allen, 242 ; Margetson v. Wright, 7 Bing. 603 ; 8 Bing. 454 ; Tye v. Finmore, 3 Camp. 462 ; Henshaw v. Robins, 9 Met. 83 ; 43 Am. Dec. 367 ; Bennett's Benjamin on Sales, §§ 616-618 ; Story on Sales, § 355 ; Fletcher v. Young, 69 Ga. 591, 593, 594.

4 See Chadsey v. Green, 24 Conn. 562, 573 ; Pinney v. Andrus, 41 Vt. 631 ; Beals v. Olmstead, 24 Vt. 114 ; 58 Am. Dec. 150 ; 2 Schouler on Personal Property, § 333 ; Bennett's Benjamin on Sales, § 616, n. e ; 2 Corbin's Benjamin on Sales, § 938, n. 9 ; Kenner v. Harding, 85 Ill. 264 ; 28 Am. Rep. 615 (mulch shown in dark stall) ; Tabor v. Peters, 74 Ala. 90 ; 49 Am. Rep. 804, 808.

5 See Marshall v. Drawhorn, 27 Ga. 275, 279 ; McCormick v. Kelly, 28 Minn. 135 ; 2 Corbin's Benjamin on Sales, § 938, n. 10 ; citing, also, Shewalter v. Ford, 34 Miss. 417, 422 ; Bank of Kansas City v. Grindstaff, 45 Ind. 158 ; Brown v. Bigelow, 10 Allen, 242, 244 ; Hill v. North, 34 Vt. 604. Consult, also, 2 Schouler on Personal Property, § 341 ; Bennett's Benjamin on Sales, § 616, n. e ; Biddle on Chattel Warranties, §§ 81, 82 ; Meckley v. Parsons, 66 Iowa, 63 ; 55 Am. Rep. 621, 622.

6 Meckley v. Parsons, 66 Iowa, 63 ; 55 Am. Rep. 621.

7 See Kingsbury v. Taylor, 29 Me. 508 ; Frazier v. Harvey, 34 Conn. 469 ; 50 Am. Dec. 607 ; Lord v. Grow, 39 Pa. St. 88 ; 80 Am. Dec. 504 ; Hadley v. Clinton etc. Co. 13 Ohio St. 502 ; 82 Am. Dec. 454 ; Parkinson v. Lee, 2 East, 314 ; so cited, 2 Schouler on Personal Property, § 324.

8 Tabor v. Peters, 74 Ala. 90 ; 49 Am. Rep. 804, 806 ; citing following cases concerning statements on sales of patents : Chalmers v. Harding, 17 L. T. N. S. 571 ; Elkins v. Kenyon, 34 Wis. 93 ; Nelson v. Wood, 62 Ala. 195 ; Bigler v. Thickingier, 35 Pa. St. 279, noted as a strikingly similar case ; Rose v. Hurley, 39 Ind. 77 ; Allen v. Hart, 72 Ill. 104.

9 Tabor v. Peters, 74 Ala. 90 ; 49 Am. Rep. 804, 807.

§ 321. Soundness or other qualities of animals.—*Rule concerning unsoundness.* In regard to a warranty using the word "sound" in the sale of horses, and whose scope may depend upon local usage and special circumstances, the rule as to unsoundness is,<sup>1</sup> that a horse is unsound when it is afflicted with any disease, or has undergone any alteration of structure which either presently does, or in its ordinary progress eventually will diminish the natural usefulness of the animal, so

as to make it less than reasonably fit for present use in work of any description.<sup>2</sup>

*Permanence of injury, etc.* It is no longer deemed necessary<sup>3</sup> that the disease calculated to cause unfitness for use or diminished usefulness should be of a permanent character;<sup>4</sup> though the rule defining unsoundness does not appear to extend to a merely temporary and curable injury, which exists at the date of sale, and does not really disqualify the animal for present service.<sup>5</sup>

*Stumbling horse, etc.* A warranty that a horse is sure-footed and all right every way, shape, or manner, except only stumbling from temporary causes, is broken if he has such an organic defect as that his stumbling can be avoided only by a peculiar mode of shoeing, which the buyer, using reasonable diligence, cannot discover.<sup>6</sup>

*Construction of phraseology.* Effect should be given to any qualification or limitation in the phraseology of a warranty of soundness or other qualities of animals,<sup>7</sup> and precise wording is requisite to raise a warranty out of expressions concerning the age, breed, previous use, etc., of the animal.<sup>8</sup> Where a horse that was partially blind was sold with a warranty, that "he was all right, except that he would sometimes shy," it was held that there was not a fatal variance between the evidence of such a warranty and an allegation that he was warranted to be sound.<sup>9</sup>

*Expressions covering character, etc.* Where an animal is warranted "sound and right," "sound and kind," "sound and perfect," "all right in every respect," etc., these phrases, which should be construed according to their natural import, would seem in substance to superadd a warranty of good character to that of good physical condition, though it would always be a fair

subject of inquiry how far vicious behavior on a horse's part was directly traceable to bodily unsoundness.<sup>10</sup>

1 See *Kenner v. Harding*, 25 Ill. 264; 28 Am. Rep. 615, 617; 2 *Schouler on Personal Property*, § 339; *Story on Sales*, § 362; *Bennett's Benjamin on Sales*, § 619; 2 *Corbin's Benjamin on Sales*, § 940; *Campbell on Sales*, 323; *Biddle on Chattel Warranties*, p. 55, § 62; note to *Roberts v. Jenkins*, 53 Am. Dec. 173, fully discussing subject.

2 See *Coates v. Stevens*, 2 *Moody & R.* 157; *Kiddell v. Burnard*, 9 *Mees. & W.* 663; *Holliday v. Morgan*, 1 El. & E. 1; *Roberts v. Jenkins*, 21 N. H. 116; 53 Am. Dec. 169; *Schurtz v. Kleinmeyer*, 36 Iowa, 392; *Kenner v. Harding*, 85 Ill. 264; 28 Am. Rep. 615, 617.

3 See *Kiddell v. Burnard*, 9 *Mees. & W.* 608.

4 As held in *Bolden v. Brogden*, 2 *Moody & R.* 113. Time of existence of defects: See note to *Roberts v. Jenkins*, 53 Am. Dec. 175; *Finley v. Quirk*, 9 *Minn.* 194; 86 Am. Dec. 93.

5 2 *Schouler on Personal Property*, § 339; citing, *Roberts v. Jenkins*, 21 N. H. 116; 53 Am. Dec. 169; *Brown v. Bigelow*, 10 *Allen*, 242. Defects constituting unsoundness: See *Hanover on Horses*, pp. 57, 69; *Oliphant's Law of Horses* (ed. 1882), p. 70, et seq. pp. 457, 461, Appx.; *Thompson's Law of the Farm*, § 133; *Bennett's Benjamin on Sales*, § 620; 2 *Corbin's Benjamin on Sales*, § 941; 2 *Schouler on Personal Property*, § 341, p. 338, n. 2; 1 *Chitty on Contracts* (11th Am. ed.), 655, n. r; *Biddle on Chattel Warranties*, p. 55, § 63, and p. 57, § 64; note to *Roberts v. Jenkins*, 53 Am. Dec. 176, fully discussing subject.

6 *Morse v. Pitman*, 4 *Atl. Rep. (N. H.)* 880. Effect of receipt guaranteeing a pair of horses to be perfectly sound and without blemish, but stating that one of them now has a cold or little distemper: *Fletcher v. Young*, 69 *Ga.* 691.

7 See *Wason v. Rowe*, 16 *Vt.* 525; *Chapman v. Gwyther*, *Law R.* 1 *Q. B.* 464; *Bywater v. Richardson*, 1 *Ad. & E.* 508.

8 See *Budd v. Fairmaner*, 8 *Bing.* 48; *Richardson v. Brown*, 1 *Bing.* 344; *Willard v. Stevens*, 21 *N. H.* 271. Basis of paragraph: 2 *Schouler on Personal Property*, § 339.

9 *Kingsley v. Johnson*, 49 *Conn.* 462.

10 2 *Schouler on Personal Property*, § 340; citing, *Walker v. Hoisington*, 43 *Vt.* 608, and other cases next noted. Warranty not protecting against consequences of animals' pregnancy: See *Whitney v. Taylor*, 54 *Barb.* 536; *Brown v. Bigelow*, 10 *Allen*, 242. Warranty that horse "well broke": *Bodurtha v. Phelon*, 2 *Allen*, 347. Inference of warranty without express phraseology: See *Cook v. Mosely*, 13 *Wend.* 277. Fitness for use in harness: *Smith v. Justice*, 13 *Wis.* 600. And see *Bodurtha v. Phelon*, 2 *Allen*, 347. Defects open or latent, etc.: 2 *Schouler on Personal Property*, § 341; citing, *Brown v. Bigelow*, 10 *Allen*, 242; *Liddard v. Kain*, 2 *Bing.* 183; *Margetson v. Wright*, 7 *Bing.* 603; 8 *Bing.* 454; *Chadsey v. Greene*, 24 *Conn.* 562; *Mulvany v. Rosenberger*, 18 *Pa. St.* 203.

### § 322. Qualified or conditional warranty.—*In general.*

A statement which can be construed as constituting a warranty, may be found to amount to no more than a conditional or qualified warranty;<sup>1</sup> as where there are modifying expressions in regard to the soundness of

animals;<sup>2</sup> and in general, effect must be given to all restrictions and limitations to which any express warranty is clearly subjected.<sup>3</sup>

*Rules of sale and limitations of continuance.* Thus an absolute warranty may prove to be modified by general rules, which the seller promulgates as applied to all sales of this description, and which are duly brought to the buyer's knowledge before the bargain is struck;<sup>4</sup> and a seller who expressly warrants for a limited period alone, as against all defects for a certain space of time, or provided notice be given of a defect without a specified number of days, is liable only for faults discovered and pointed out by the buyer within the stated period.<sup>5</sup>

*Test and trial of article.* It would seem to be the doctrine of the authorities that if, accompanying a sale, there is a warranty that the article, if set up in a certain manner and location, and operated in a certain way, will prove satisfactory, as that exhaust fans for a blacksmith shop would exhaust the smoke and gases in a satisfactory manner, such warranty is conditional upon the test and trial agreed to be made, and the purchaser must make his determination in regard to the fulfillment of the warranty, not upon mere investigation, but only after test and trial based upon setting up and operating the article in the mode agreed.<sup>6</sup>

1 2 Schouler on Personal Property, § 330. And see Bennett's Benjamin on Sales, § 615. Proof of a conditional warranty will not support an allegation of an absolute warranty: Deming v. Foster, 42 N. H. 185.

2 See Smith v. Borst, 63 Barb. 57 (directions to cure defect); Wood v. Smith, 5 Moody & R. 124 (refusal to positively warrant).

3 2 Schouler on Personal Property, § 330.

4 See Bywater v. Richardson, 1 Ad. & E. 508.

5 See Bywater v. Richardson, 1 Ad. & E. 508; Chapman v. Gwyther, Law R. 1 Q. B. 463; Story on Sales, § 363. Basis of paragraph: 2 Schouler on Personal Property, § 330. Like effect: Campbell on Sales, 320; Biddle on Chattel Warranties, § 75. Notice of defects: See next section on that subject.



6 Exhaust Ventilator Co. v. Chicago etc. Ry. Co. 28 N. W. Rep. (Wis.) 343; 22 The Reporter, 381; reviewing Manny v. Glendenning, 15 Wis. 50; Manuf. Co. v. Brush, 43 Vt. 528; Daggett v. Johnson, 49 Vt. 345.

§ 323. *Notice of defects.—Keeping machinery without.* Where a warranty in a written and printed order on a sale of machinery contains a condition that written notice of any failure on the part of the machinery to fill the warranty should be given within the first ten days of its use, and that continued use or possession thereof after the expiration of the ten days should be conclusive evidence of the fulfillment of the warranty to the satisfaction of the buyer, there is no breach thereof, of which the purchaser can take advantage, when it appears that the machinery had been used for two months, and that no written notice had ever been given, although the machinery failed to work satisfactorily on the very first day of use.<sup>1</sup>

*Not given within stipulated time.* But the omission of the purchaser of an engine and belt designed to run a threshing-machine, who relies as a defense to a price note upon the failure of the engine to fulfill the terms of a warranty, to give written notice of the failure to do its work properly within the time specified in the contract of purchase, is not conclusive that the engine performed properly;<sup>2</sup> nor will it prevent such defense, where it appears that the delay was occasioned by the desire and efforts of the seller to remedy the defects, that written notice was given within a reasonable time, and that there was ample justification for a finding of waiver by the seller of his right to insist upon such notice within the stipulated time.<sup>3</sup>

*Waiver, etc.* And it has been held that the seller might waive the written notice where there was a condition in a warranty of an agricultural machine, sold in Minnesota, that written notice stating wherein the

machine failed to satisfy the warranty was to be immediately given by the purchaser to the seller at a place in Michigan, and reasonable time allowed to get to it and remedy the defect, unless it was of such a nature that the seller could advise by letter.<sup>4</sup>

1 *Brown v. Russell*, 105 Ind. 46, 54 ; 4 N. E. Rep. 428.

2 *Nat. Bank & Loan Co. v. Dunn*, 106 Ind. 110, 118 ; 6 N. E. Rep. 131.

3 *Nat. Bank & Loan Co. v. Dunn*, 106 Ind. 110, 118, 119 ; citing, *McCormick etc. Co. v. Gray*, 100 Ind. 285 ; and distinguishing, *Brown v. Russell*, 105 Ind. 46.

4 *Nichols v. Root*, 29 N. W. Rep. (Minn.) 160 ; following *Nichols v. Knowles*, 31 Minn. 489 ; 18 N. W. Rep. 413. In such a case, it was further held, the purchaser might give the notice by properly mailing it, and through an agent writing in his behalf, although such agent was for other purposes agent for the seller : *Nichols v. Root*, 29 N. W. Rep. 160.

## CHAPTER XXIII.

## WARRANTY OF TITLE.

- § 324. In general.
- § 325. Transfer of interest, etc.
- § 326. Transfer of incorporeal personality.
- § 327. General doctrines.
- § 328. Seller's possession.
- § 329. Breach by dispossession, etc.
- § 330. Existence and removal of encumbrances.

§ 324. In general. — *Derived from seller's language, conduct, etc.* The courts are quite ready to construe, as constituting an express warranty, language, acts, and conduct of the seller, amounting to an affirmation of anything concerning the specific subject-matter of the sale, which might reasonably be the basis of a warranty upon the assumption that they were relied upon by the buyer, and were so designed;<sup>1</sup> and this principle has been thought quite broad enough to include many of the cases which might involve the question whether there was a warranty of title or not.<sup>2</sup>

*On executory sale.* It is also well settled that in an executory agreement for a sale of personal property,<sup>3</sup> the vendor warrants, by implication, his title to the goods which he promises to sell,<sup>4</sup> since the contract would not be fulfilled by the transfer of the possession of another's goods, instead of a transfer of the title to goods which he could enjoy and use as his own.<sup>5</sup>

*Effect of fraud.* So where the seller knows that the chattels which he offers for sale do not belong to him, and conceals his want of title from the buyer, the latter is not liable for the price of goods whose transfer was infected with fraud.<sup>6</sup>

*Implied warranty.* But where there is no express

warranty, and in the absence of fraud, the maxim *caveat emptor*<sup>7</sup> was originally deemed applicable to present sales of personal property;<sup>8</sup> though in England, it has been declared that the exceptions "well nigh eat up the rule";<sup>9</sup> and in this country it is the settled law that the vendor of personal property in his possession warrants his title to the same by implication.<sup>10</sup>

*Transfer of interest.* In both countries, however there is no implied warranty of title upon a transfer merely of the interest in a chattel held by the party selling or directing the sale;<sup>11</sup> though the bargain and sale of a specific chattel, where nothing further remains to be done according to the intent of the parties to pass the title, undoubtedly transfers all the property the vendor has.<sup>12</sup>

*Rebutting presumption.* And whether the sale be by written bill of sale or oral transfer, the implied warranty of title may be rebutted by parol, and the vendor may thus overcome the legal presumption by proof that he did not warrant the title.<sup>13</sup>

1 See citations in next note. Express and implied warranty: See § 316, on KINDS OF WARRANTY.

2 2 Schouler on Personal Property, § 371; citing, *Burgess v. Wilkinson*, 13 R. I. 646; *Adamson v. Jarvis*, 4 Bing. 66; 1 Schouler on Personal Property, §§ 330, 331. So it is said to be universally conceded that an affirmation by the vendor of an ascertained specific chattel, that the chattel is his, which is equivalent to warranty of title, may be implied from the conduct of the seller, as well as from his words, and may also result from the nature and circumstances of the sale: *Bennett's Benjamin on Sales*, § 627. See *Eichholz v. Bannister*, 17 Com. B. N. S. 708; *Bagueley v. Hawley*, Law R. 2 Com. P. 625; *Sims v. Marryat*, 17 Q. B. 281; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592; note to *Scott v. Hix*, 62 Am. Dec. 461. And compare 2 Blackst. Com. 451.

3 See generally chapter on EXECUTORY SALES.

4 See *Brown v. Cockburn*, 37 Up. Can. Q. B. 592.

5 See *Morley v. Attenborough*, 3 Ex. 500; *Bennett's Benjamin on Sales*, §§ 627, 630. And in the case of such an executory sale, the purchaser has the right to refuse to accept the chattel under a defective title not made clear by the seller, and to recover any portion of the purchase money which he may have advanced, or to escape liability for payment of the unpaid price if the chattel be recovered from him: See *Morley v. Attenborough*, 3 Ex. 500, 509; *Story on Sales*, § 367 *b*; 2 Schouler on Personal Property, § 369; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592.

6 See *Sweetman v. Prince*, 62 Barb. 256, 257; *Morley v. Attenborough*, 3 Ex. 500; *Bennett's Benjamin on Sales*, § 627, n. i, and § 620; *Story on Sales*, § 367 b; 2 *Schouler on Personal Property*, § 370.

7 See *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278, 282; *Long v. Hickingbottom*, 28 Miss. 772; 64 Am. Dec. 118, 119; 2 Kent Com. 608, 609.

8 See *Morley v. Attenborough*, 3 Ex. 500; *Noy's Maxims*, ch. 42; Co. Lit. 102 a; note to *Scott v. Hix*, 62 Am. Dec. 460. But compare, *contra*, 2 Blackst. Com. 451.

9 *Sims v. Marryat*, 17 Q. B. 281, 290. And consult *Eichholz v. Banister*, 17 Com. B. N. S. 708; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, very fully reviewing English authorities; note to *Scott v. Hix*, 62 Am. Dec. 461, 462.

10 See *Johnson v. Powers*, 65 Cal. 179; *Baker v. McAllister*, 3 Pac. Rep. (Wash. T.) 531; *Byrnside v. Burdett*, 15 W. Va. 702; *Whitney v. Heywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 45; *People's Bank v. Kurtz*, 99 Pa. St. 354; 44 Am. Rep. 112; note to *Scott v. Hix*, 62 Am. Dec. 463; note to *Reynolds v. Palmer*, 21 Fed. Rep. 457. Consult, also, *Somers v. O'Donohue*, 9 Up. Can. C. P. 210. So on an exchange of chattels; see *Hunt v. Sackett*, 31 Mich. 18; *Patee v. Pelton*, 48 Vt. 182; *Byrnside v. Burdett*, 15 W. Va. 702; note to *Scott v. Hix*, 62 Am. Dec. 467, so citing these cases, and referring, also, to *Gaylor v. Copes*, 16 Fed. Rep. (La.) 49 (payment in chattels). And consult *Sargent v. Currier*, 49 N. H. 310, 311; 6 Am. Rep. 524.

11 See *Chapman v. Speller*, 14 Q. B. 621; 19 Law J. Q. B. 241; *Hoc v. Sanborn*, 21 N. Y. 556; 78 Am. Dec. 163; *First Nat. Bank v. Mass. etc. Co.* 123 Mass. 330; *Biddle on Chattel Warranties*, §§ 258-262; note to *Scott v. Hix*, 62 Am. Dec. 466.

12 *Morley v. Attenborough*, 3 Ex. 500.

13 *Johnson v. Powers*, 65 Cal. 179; citing, *Miller v. Van Tassel*, 24 Cal. 458. And consult note to *Scott v. Hix*, 62 Am. Dec. 466.

§ 325. *Transfer of interest, etc.—In general.* A warranty of title will not be implied where it is expressly negatived, or where the circumstances clearly show that there was no warranty intended or understood.<sup>1</sup> Thus one may bargain merely for the seller's quit claim of title,<sup>2</sup> as where one buys goods knowing that they are claimed by a third party,<sup>3</sup> and meaning to take the risk;<sup>4</sup> and generally where the facts are equally well known to both parties, and the sale is made under circumstances indicating that the vendor intends to transfer only his interest.<sup>5</sup>

*Official sales.* Upon this ground or that of the official character of such sales,<sup>6</sup> it is held that there is no warranty of title implied in the case of judicial sales or others made in a fiduciary or representative capacity;

as in the instances of sales made by sheriffs and other officers of the law, or by executors, administrators, or other trustees.<sup>7</sup>

*Sales of pledged or mortgaged chattels.* And the same rule applies to the sale by the pledgee or mortgagee of a chattel of the property which he holds as security for his debt.<sup>8</sup>

1 See Story on Sales, § 367 *a*; 2 Schouler on Personal Property, § 372.

2 See *Morley v. Attenborough*, 3 Ex. 500.

3 See *Bogart v. Chrystie*, 24 N. J. L. 57, 60.

4 2 Schouler on Personal Property, § 372, suggesting that to this general principle should perhaps be assigned numerous cases which are differently distinguished by the courts, and referring to *Page v. Cowasjee Eduljee*, Law R. 1 P. C. 127, and *Baguely v. Hawley*, Law R. 2 Com. P. 625.

5 *Hopkins v. Grinnell*, 28 Barb. 533; as cited in note to *Scott v. Hix*, 62 Am. Dec. 466; referring, also, to *Jones v. Hungerford*, 3 Met. 515; and *First Nat. Bank v. Mass.*, etc. Co. 123 Mass. 350; and to contrary view in *Dresser v. Ainsworth*, 9 Barb. 626. See, also, *Krumbhaar v. Birch*, 83 Pa. St. 426, 427, 428; *Brown v. Cockburn*, 37 Up. Can. Q. B. 591, 603, 604, 606.

6 See *Hoe v. Sanborn*, 21 N. Y. 552, 556; 78 Am. Dec. 163.

7 See *Chapman v. Speller*, 11 Q. B. 621; *Blood v. French*, 9 Gray. 197; *Bartholomew v. Warner*, 32 Conn. 98; *Scranton v. Clark*, 39 N. Y. 220; *Baker v. Arnot*, 67 N. Y. 443; *Fore v. McKenzie*, 58 Ala. 115; *Harrison v. Shanks*, 13 Bush. 620; *Henslew v. Baker*, 10 Mo. 157; *Stephens v. Ellis*, 65 Mo. 456; *Mechanics' Assoc. v. O'Conner*, 29 Ohio St. 651; *Brigham v. Maxey*, 15 Ill. 255; 2 Schouler on Personal Property, § 372, so citing these cases; *Story on Sales*, § 367 *a*; 2 Corbin's *Benjamin on Sales*, § 961, n. 20; citing, also, *Mockbee v. Gardner*, 2 Har. & G. 176; *Storm v. Smith*, 43 Miss. 407; *Hicks v. Skinner*, 71 N. C. 539; *Corwin v. Benham*, 2 Ohio St. 36; *Brunner v. Brennan*, 49 Ind. 98; *Neal v. Gillaspie*, 56 Ind. 451; *The Mont Allegre*, 9 Wheat. 616; *Biddle on Chattel Warranties*, §§ 261, 262; quoting, *Hoe v. Sanborn*, 21 N. Y. 552, 556; 78 Am. Dec. 163. Consult, also, note to *Scott v. Hix*, 62 Am. Dec. 466.

8 See *Morley v. Attenborough*, 3 Ex. 500; *Sheppard v. Earles*, 13 Hun. 651, 653; note to *Scott v. Hix*, 62 Am. Dec. 466; *Sims v. Marryat*, 17 Q. B. 281, 290; *Brown v. Cockburn*, 37 Up. Can. Q. B. 591, 604.

§ 326. *Transfer of incorporeal personalty.—Warranty of title.* The doctrine that the vendor of chattels in possession impliedly warrants the title extends to choses in action,<sup>1</sup> whether negotiable or otherwise,<sup>2</sup> as well as to other descriptions of personal property.<sup>3</sup>

*Scope and application.* And the import of the warranty in such a case is said to be that the chose in action

is genuine, and not spurious, false, or counterfeit.<sup>4</sup> This principle applies to transfers of notes, bonds, stock, warrants, accounts, etc.<sup>5</sup>

*Patent rights.* In the transfer of patent rights it has also been laid down that the seller impliedly makes the same warranty of title as if he were disposing of any other species of personal property;<sup>6</sup> though the exact scope of this warranty as covering the existence, or also the validity of the patent, and under various forms and subjects of assignment, seems to be a matter of some uncertainty.<sup>7</sup>

1 *Flynn v. Allen*, 57 Pa. St. 482; as quoted in note to *Scott v. Hix*, 62 Am. Dec. 467. And see *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Boyd v. Anderson*, 1 Over. 438; 3 Am. Dec. 762, 768, 769; *Woods v. Sheldon*, 13 Vroom, 421; 36 N. J. L. 524, fully discussing subject; *Porter v. Bright*, 82 Pa. St. 441, 443.

2 See *Boyd v. Anderson*, 1 Over. 438; 3 Am. Dec. 762, 769; *Wood v. Sheldon*, 13 Vroom, 421; 36 Am. Rep. 523.

3 *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112, holding that on a sale of stock there is an implied warranty of title and genuineness, but not that the stock is not part of a fraudulent over-issue. Compare *State v. North La. etc. R. R. Co.* 34 La. An. 947, 953; *Currie v. White*, 6 Abb. Pr. N. S. 352, 376, 377.

4 See *Flynn v. Allen*, 57 Pa. St. 482; note to *Scott v. Hicks*, 62 Am. Dec. 467; *Swanzy v. Parker*, 50 Pa. St. 441, 450. Compare *Baker v. Arnot*, 67 N. Y. 448.

5 See *Swanzy v. Parker*, 50 Pa. St. 441, 450; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205, 209; *Donaldson v. Newman*, 9 Mo. App. 235, 242; *Porter v. Bright*, 82 Pa. St. 441, 443; *Gilchrist v. Hilliard*, 53 Vt. 592; 38 Am. Rep. 706, holding that warranty implied that accounts exist and are due. Consult, also, cases in note before last.

6 *Darst v. Brockway*, 11 Ohio, 462, 471.

7 Compare *Smith v. Neale*, 2 Com. B. N. S. 67, and *Hall v. Conder* 2 Com. B. N. S. 22, with *Pacific Iron Works v. Newhall*, 34 Conn. 67, 77, and *Croninger v. Paige*, 48 Wis. 229, 232, 233. Consult 2 Schouler on Personal Property, § 373; Biddle on Chattel Warranties, §§ 248-257, fully discussing subject, and reviewing, also, *Geiger v. Cook*, 3 Watts & S. 270; *Nash v. Lull*, 102 Mass. 60; 3 Am. Rep. 435, 437; *Holden v. Curtis*, 2 N. H. 61, 63; *Faulks v. Kamp*, 3 Fed. Rep. 893, 900; *Gray v. Billington*, 21 Up. Can. C. P. 288; and *Chanter v. Leese*, 4 Mees. & W. 295; 5 Mees. & W. 698. See further *Curran v. Burdsall*, 20 Fed. Rep. 835.

§ 327. *General doctrines.*—*In England.* In England, it has been declared to be the result of the older authorities, that there is no warranty of title in the actual contract of sale, any more than there is of quality, but that

the rule of *caveat emptor* applies to both ;<sup>1</sup> and it has been held that if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and sells only such right as belonged to the pawnee.<sup>2</sup> But on the other hand it has been held that a purchaser at the seller's warehouse of goods which turned out to have been stolen, so that the buyer was compelled to restore them to the owner, might recover back on the common money counts the price which he had paid for the goods, upon the ground that the seller by his conduct in disposing of the goods as a shopkeeper had affirmed that he was the owner of the goods sold, and that the consideration of the contract had therefore failed.<sup>3</sup> And it has been asserted that while it may be otherwise in cases where the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had,<sup>4</sup> yet in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would lead the purchaser to believe that he was the owner of the chattel ;<sup>5</sup> and in almost all modern transactions the vendor, in consideration of the purchaser paying the price, is understood to affirm that he is the owner of the article sold.<sup>6</sup> Accordingly it has been suggested that the rule as stated in accordance with the recent English decisions would seem to be, that a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.<sup>7</sup>

*In Canada.* And in Canada positive intimations favorable to this conclusion have been thrown out in a



case of an executory sale where there could be no question but that there was a warranty of title.<sup>8</sup>

*In United States.* In the United States some of the cases, without making any reference to the seller's possession, declare generally that every vendor of chattels is supposed to know his title, and to warrant title to what he assumes to sell, if he sells without disclosing any defects that may exist in his title.<sup>9</sup> But according to a statement of the law, perhaps conforming more closely to the current of authority, it may now be regarded as well settled in this country that a party selling as his own, personal property of which he is in possession, warrants the title to the thing sold,<sup>10</sup> and that if by reason of a defect of title nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor.<sup>11</sup>

1 *Morley v. Attenborough*, 3 Ex. 500. But see *Sims v. Marryat*, 17 Q. B. 231, 20, *Eichholz v. Bannister*, 17 Com. B. N. S. 708; 34 Law J. Com. P. 105; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, 604.

2 *Morley v. Attenborough*, 3 Ex. 500; as stated, *Sims v. Marryat*, 17 Q. B. 231; 20 Law J. Q. B. 451. And see *Chapman v. Speller*, 14 Q. B. 621; 19 Law J. Q. B. 241; 2 *Schouler on Personal Property*, § 376; § 325, on TRANSFER OF INTEREST, ETC.; *Hoe v. Sanborn*, 21 N. Y. 552, 555; 78 Am. Dec. 163.

3 *Eichholz v. Bannister*, 17 Com. B. N. S. 708; 34 Law J. Com. P. 105; noted in *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, 604, 605.

4 See *Morley v. Attenborough*, 3 Ex. 500; *Chapman v. Speller*, 14 Q. B. 621; *Hail v. Conder*, 2 Com. B. N. S. 22.

5 *Eichholz v. Bannister*, 17 Com. B. N. S. 708. See *Bennett's Benjamin on Sales*, §§ 65, 66; citing, *L'Apostre v. L'Plastier*, as cited in *Ryall v. Rowles*, 1 Ves. Sr. 351, and *Tudor's Leading Cases in Equity* (5th ed.), 733; also reported as *Ryall v. Rolle*, 1 Atk. 165. Consult *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, 602.

6 *Eichholz v. Bannister*, 17 Com. B. N. S. 708; 34 Law J. Com. P. 105. See 2 *Schouler on Personal Property*, § 377.

7 See *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, 605; note to *Reynolds v. Palmer*, 21 Fed. Rep. 456; note to *Scott v. Hix*, 62 Am. Dec. 460-463, fully discussing English doctrine; *Bennett's Benjamin on Sales*, § 65; *Biddle on Chattel Warranties*, §§ 227-233. But compare *contra*, *Chitty on Contracts* (11th ed.), 413; *Broom's Legal Maxims* (5th ed.), 730-801; *Leake Dig. Contr* 402; 2 *Taylor on Evidence*, 984.

8 *Brown v. Cockburn*, 37 Up. Can. Q. B. 592, 606. And in another instance, where evidence of an express warranty was found sufficient, an inclination was expressed toward the opinion that where a man sells as his own a chattel which is then in his actual possession,

and delivers it to the purchaser, from whom it is taken by the rightful owner, the vendor is to be treated as impliedly warranting that he has a right to sell, and is therefore bound to compensate his vendee for the loss: *Somers v. O'Donohue*, 9 Up. Can. C. P. 208. But compare *Johnston v. Barker*, 20 Up. Can. C. P. 223, 231, 232; note to *Scott v. Hix*, 62 Am. Dec. 463.

9 See *McKnight v. Devlin*, 52 N. Y. 401; 11 Am. Rep. 715; *Hoe v. Sanborn*, 21 N. Y. 552, 553; 78 Am. Dec. 163; distinguishing, *Morley v. Attenborough*, 3 Ex. 500; *Ricks v. Dillahanty*, 8 Port. 157. But consult *Huntington v. Hall*, 36 Me. 501; 58 Am. Dec. 765, 766.

10 *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112. And see note to *Scott v. Hix*, 62 Am. Dec. 463; note to *Reynolds v. Palmer*, 21 Fed. Rep. 457; also, *Johnson v. Powers*, 65 Cal. 179; *Baker v. McAllister*, 3 Pac. Rep. (Wash. T.) 581.

11 *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112. See *Biddle on Chattel Warranties*, §§ 236-238; note to *Reynolds v. Palmer*, 31 Fed. Rep. 457.

§ 328. **Seller's possession.**—*As determining feature.* The courts of the United States have repeatedly recognized a distinction between the transfer of chattels which are in the seller's possession, where there is considered to be an implied warranty of title on the seller's part, and the transfer of chattels which are in the possession of another party, where no such warranty is implied, and the vendee buys at his peril.<sup>1</sup>

*Distinction established.* This distinction, which appears to have been repudiated by the later English decisions,<sup>2</sup> is said to be too deeply rooted in our law to be easily eradicated, even if it were shown to be misconceived in its origin.<sup>3</sup>

*Qualification of doctrine.* Some of the recent cases, however, tend to establish the doctrine that the sale of personal property implies a warranty of ownership in the seller, unless the circumstances are such as to give rise to a contrary presumption, as is particularly the case where the goods are absolutely in a third person's possession, and neither absolutely nor constructively in the possession of the seller.<sup>4</sup>

*Constructive possession.* But constructive possession through a servant or agent of the vendor, or of a tenant

in common with him, is sufficient to raise an implied warranty of title.<sup>5</sup>

*Inference of possession.* And in the absence of evidence to the contrary, it may be presumed that the seller had possession at the time of the sale, as well as that the sale was for a fair price.<sup>6</sup>

1 See *Burnside v. Burdett*, 15 W. Va. 702. And consult *Whitney v. Heywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 45; *People's Bank v. Kurtz*, 99 Pa. St. 344; 44 Am. Rep. 112; *Word v. Cavin*, 1 Head, 506; *Biddle on Chattel Warranties*, §§ 241-245; note to *Reynolds v. Palmer*, 21 Fed. Rep. 457; note to *Scott v. Hix*, 62 Am. Dec. 463; *Johnson v. Powers*, 65 Cal. 179; *Baker v. McAllister*, 3 Pac. Rep. (Wash. T.) 531. Compare *Huntingdon v. Hall*, 36 Me. 501; 58 Am. Dec. 765, 766; *Long v. Hickingbottom*, 28 Miss. 772; 64 Am. Dec. 118, 119; note to *Scott v. Hix*, 62 Am. Dec. 463, 464. Like view favored in Canada: See *Somers v. O'Donohue*, 9 Up. Can. C. P. 210.

2 See *Pasley v. Freeman*, 3 Term Rep. 58; *Morley v. Attenborough*, 3 Ex. 509; *Eichholz v. Bannister*, 17 Com. B. N. S. 703; *Bennett's Benjamin on Sales*, § 611; *Byrnside v. Burdett*, 15 W. Va. 702. And consult note to *Scott v. Hix*, 62 Am. Dec. 465.

3 See *Byrnside v. Burdett*, 15 W. Va. 702; *Story on Sales*, § 367, n. on p. 436; 2 Kent Com. 478; *Biddle on Chattel Warranties*, § 242; 2 *Schouler on Personal Property*, § 378.

4 See *Gross v. Kierski*, 41 Cal. 111, 114; *Shattuck v. Green*, 104 Mass. 42, 44; *Sherman v. Champlain Transp. Co.* 31 Vt. 162, 175; 2 *Schouler on Personal Property*, § 378; *Whitney v. Heywood*, 6 Cush. 82, 86.

5 See *Huntingdon v. Hall* 36 Me. 501; 58 Am. Dec. 765, 766; *Shattuck v. Green*, 104 Mass. 42, 45.

6 See *Long v. Hickingbottom*, 28 Miss. 772; 64 Am. Dec. 118, 120; note to *Scott v. Hix*, 62 Am. Dec. 465.

§ 329. *Breach by dispossession, etc.—Need of eviction, or disturbance of possession.* It seems to be the rule in many of the States that in the absence of fraud on the part of the seller, a purchaser of personal property cannot defeat an action for the price, by showing that the property is owned by another, unless he has been ousted, or there has been a recovery by the true owner;<sup>1</sup> and that there is no breach of the implied warranty of title, such as would, for instance, initiate the running of the statute of limitations, until the vendee is disturbed in his possession of the chattels.<sup>2</sup>

*Deprivation of possession unnecessary.* But in some of the States it seems to be held, that if a chattel be sold

to which the vendor has no title, the implied warranty of title is broken at the time of sale, and that the purchaser may immediately maintain his action for damages, whether he has been deprived of the possession of the chattel or not.<sup>3</sup>

*Express and implied warranty of title.* And it is said to be the settled rule in Kentucky, making a distinction between an express warranty of title to chattels and the warranty of title implied by law,<sup>4</sup> that in case of the former there is a breach of the warranty, and the statute of limitations commences to run from the time when the vendee is disturbed in his possession, while in case of implied warranty the statute is set in motion instantly upon the sale and delivery of the goods.<sup>5</sup>

*Surrender of property, etc.* In Missouri, it is held that a purchaser of personal property is not required to wait for an actual deprivation by the true owner, but may surrender the property voluntarily, though he must then be able to show conclusively that his surrender was to the true owner.<sup>6</sup>

1 See *Sweetman v. Prince*, 62 Barb. 256, 257; and consult *Case v. Hall*, 24 Wend. 96; 35 Am. Dec. 605; as quoted, 22 Am. Law Reg. N. S. 96; or *Biddle on Chattel Warranties*, § 295, which also refers to *Vibbard v. Johnson*, 19 Johns. 77. Compare, also, *Krumbhaar v. Birch*, 83 Pa. St. 428, with *Flynn v. Allen*, 57 Pa. St. 485.

2 See *Gross v. Kierski*, 41 Cal. 111. And consult *Linn v. Porter*, 31 Ill. 107.

3 See *Perkins v. Whelan*, 116 Mass. 542; *Grose v. Hennessy*, 13 Allen, 389. Compare *Gay v. Kingsley*, 11 Allen, 345; *Word v. Cavin*, 1 Head, 507.

4 See *Gross v. Kierski*, 41 Cal. 111; 22 Am. Law Reg. N. S. 96; or *Biddle on Chattel Warranties*, § 296.

5 See *Payne v. Rodden*, 4 Bibb, 304; 7 Am. Dec. 739; *Scott v. Scott*, 2 Marsh. A. K. 217; *Tiptart v. Triplett*, 1 Met. 570; *Chancellor v. Wiggins*, 4 Mon. B. 202; 39 Am. Dec. 499.

6 *Dryden v. Kellogg*, 2 Mo. App. 92. And see *Matheny v. Mason*, 73 Mo. 677, 683; 30 Am. Rep. 541, 545, and cases cited; also *McGiffen v. Baird*, 62 N. Y. 329. Compare, generally, *Estelle v. Peacock*, 48 Mich. 461. Condemnation of liquor for violation of revenue law: Compare *McKnight v. Devlin*, 52 N. Y. 399, 11 Am. Rep. 715, with *Palmer v. Hatch*, 46 Mo. 585. On subject of section, consult further following sources of foregoing matter: 2 *Schouler on Personal Property*, § 378, p. 378; *Bennett's Benjamin on Sales*, § 627, n. i; 2 *Corbin's Benjamin*

on Sales, § 948, n. 18 ; Story on Sales, 367 b ; 22 Am. Law Reg. N. S. 96-98 ; Biddle on Chattel Warranties, §§ 294-302 ; Gross v. Kierski, 41 Cal. 111 ; Matheny v. Mason, 73 Mo. 677 ; 39 Am. Rep. 541. Proof of breach where no eviction : Plummer v. Newdigate, 2 Duval, 1 ; 87 Am. Dec. 479. And compare Bergen v. Riggs, 34 Ill. 170 ; 85 Am. Dec. 304.

§ 330. **Existence and removal of encumbrances.**— *Warranty extends to encumbrances.* The warranty of title which arises under the settled law of this country, on the sale of property in the possession of the vendor,<sup>1</sup> extends to encumbrances.<sup>2</sup>

*Refusal to retain goods.* And it has been held that where a sale is made with warranty of title, of property upon which there was at the time a lien of any kind, not known to the vendee, by reason whereof the property is taken and kept from the vendee, without any negligence or fault on his part, such taking will of itself, at the option of the vendee, work a rescission of the contract of sale, and be a good defense to an action for the purchase price,<sup>3</sup> even after the goods have been delivered, upon tendering them back to the vendor.<sup>4</sup>

*Paying off encumbrances.* The buyer may, however, pay off encumbrances on property sold him, and bring suit for damages for breach of the warranty of title, or set up the amount paid in reduction of the price on a suit for the purchase money,<sup>5</sup> though the right of action will not accrue until the money is paid.<sup>6</sup>

*Express warranty.* The liability of the seller is even more definitely fixed where there is an express warranty of title against encumbrances.<sup>7</sup> And there may be redress for breach of warranty in paying off an encumbrance without actual eviction, where there was a sale to a stranger, under foreclosure, of store-fixtures originally disposed of with a covenant to "warrant and defend the sale," etc., and agreement on the part of the seller to satisfy a chattel mortgage.<sup>8</sup>

1 See *Baker v. McAllister*, 3 Pac. Rep. (Wash. T.) 581; referring to following cases: *Brown v. Pierce*, 97 Mass. 46; *Williamson v. Sammons*, 34 Ala. 691; *Word v. Cavin*, 1 Head, 506; *Linton v. Porter*, 31 Ill. 107; *Fawcett v. Osborn*, 32 Ill. 411; 83 Am. Dec. 278; *Boyd v. Whitfield*, 19 Ark. 447; *Chism v. Woods*, Hardin, 541; 3 Am. Dec. 740; *Heermance v. Vernoy*, 6 Johns. 5; *Swett v. Colgate*, 20 Johns. 196; 11 Am. Dec. 266; *McCoy v. Artcher*, 3 Barb. 323; *Doe v. Stanion*, 1 Mees. & W. 701; *Vibbard v. Johnson*, 19 Johns. 78; *Coolidge v. Brigham*, 1 Met. 551; *Willing v. Peters*, 12 Serg. & R. 181; *Dean v. Mason*, 4 Conn. 428; 10 Am. Dec. 162; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *Bayse v. Briscoe*, 13 Mon. B. 474.

2 *Baker v. McAllister*, 3 Pacif. Rep. 581.

3 See *Defreese v. Trumper*, 1 Johns. 274; 3 Am. Dec. 329; *Dresser v. Ainsworth*, 9 Barb. 619; *Blasdale v. Babcock*, 1 Johns. 518; *Read v. Staton*, 3 Hayw. (N. C.) 159; 5 Am. Dec. 740.

4 *Baker v. McAllister*, 3 Pacif. Rep. 581.

5 See *Sargent v. Currier*, 49 N. H. 310; 6 Am. Rep. 524; *Harper v. Dotson*, 43 Iowa, 232; *Lane v. Romer*, 2 Chand. 61; *Baker v. McAllister*, 3 Pacif. Rep. 581.

6 See *Burt v. Dewey*, 40 N. Y. 283; *Sargent v. Currier*, 49 N. H. 310; 6 Am. Rep. 524; 2 Corbin's Benjamin on Sales, § 948, n. 18.

7 *Atkins v. Hosley*, 3 Thomp. & C. 322; *Hahn v. Doolittle*, 18 Wis. 196; 2 Schouler on Personal Property, § 378, p. 378, n. 1; referring, also, to *Michel v. Ware*, 3 Neb. 229; *Burgess v. Wilkinson*, 13 R. I. 646. But words in a written contract importing a quit claim cannot be construed into a warranty of title: See *First Nat. Bank v. Loan & Trust Co.* 123 Mass. 330; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

8 *Cahill v. Smith*, 4 N. E. Rep. (N. Y.) 730; affirming, 31 Hun, *mem.*; referring to *Bordwell v. Colie*, 45 N. Y. 494; *McGiffin v. Baird*, 62 N. Y. 329.

## CHAPTER XXIV.

## WARRANTY OF QUALITY.

- § 331. *Caveat emptor.*
- § 332. Opportunity for inspection.
- § 333. Implied warranty of quality.

§ 331. *Caveat emptor.*—*English doctrine.* In England, the decisions enunciate or favor the general principle that the seller is not liable for defects of any kind in the thing sold, so that there is no implied warranty of the quality of a known, ascertained article, unless there is an express warranty or fraud.<sup>1</sup>

*Sound price.* And in this country there is in most of the States a repudiation of the doctrine of the civil law,<sup>2</sup> which was at one time recognized and adopted in at least two of the States,<sup>3</sup> that a sale for a sound price implies a warranty of the thing sold.<sup>4</sup>

*Application of maxim.* But it is laid down that the rule of the common law is well established,<sup>5</sup> that upon a sale of goods, if there is no express warranty of the goods, and no actual fraud, the maxim *caveat emptor* applies and the goods are at the risk of the buyer;<sup>6</sup> and it is declared that the doctrine of *caveat emptor* is of such universal acceptance in this country that it is sanctioned, with one exception,<sup>7</sup> by the courts of all the States in the Union where the common law prevails.<sup>8</sup>

*Latent defects.* Even where there are latent defects in the chattel sold, such as fatal diseases in animals, yet in the absence of fraud on the part of the seller, and special knowledge beyond that of the buyer, the consequences must fall upon the buyer, if he has not protected himself by an express warranty.<sup>9</sup> But the doctrine of *caveat emptor* does not apply, although the article

was inspected before purchase, and it is not shown that the sellers manufactured it, if it was sold for a specific use, and the defect was latent and known to the sellers and concealed by them from the buyers at the time the sale was made.<sup>10</sup>

*Extent of exceptions.* And so many exceptions to the common-law rule of *caveat emptor* have arisen and become recognized, that the tendency of the decisions is toward the opposite doctrine of the Roman law, that of *caveat venditor*, and the present law seems to occupy a ground between those embodied in these conflicting maxims.<sup>11</sup>

1 See *Hall v. Conder*, 2 Com. B. N. S. 40; *Harvey v. Young*, Yel. 21; *Parkinson v. Lee*, 2 East, 320; as cited, *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. Consult, also, *Campbell on Sales*, 324; 2 *Schouler on Personal Property*, § 43; citing, *Hopkins v. Tanqueray*, 15 Com. B. 130; *Jones v. Just*, Law R. 3 Q. B. 137.

2 See *Seixas v. Woods*, 2 Caines, 48; *Hart v. Wright*, 17 Wend. 269.

3 See *Bailey v. Nickolls*, 2 Root, 407; 1 Am. Dec. 83; *Whitefield v. McLeod*, 2 Bay, 350; 1 Am. Dec. 650. Still prevails in South Carolina: See *Thomas v. Sexton*, 15 S. C. 93.

4 *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. And see 2 *Schouler on Personal Property*, § 335; citing, *Story on Sales*, § 370; *Mixer v. Coburn*, 11 Met. 559; 45 Am. Dec. 230; *Mason v. Chappell*, 15 Gratt. 572; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411. But see *Pease v. Sabin*, 38 Vt. 432.

5 See *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Rep. 429, 430; *Getty v. Rountree*, 2 Pinn. 379; 2 Chand. 28; 54 Am. Dec. 133, 140.

6 *Mixer v. Coburn*, 11 Met. 561; 45 Am. Dec. 220. And see *Ryan v. Ulmer*, 103 Pa. St. 322; 56 Am. R. p. 210, 213; *Maxwell v. Lee*, 27 N. W. Rep. (Minn.) 196; 21 The Reporter, 727. At least in the case of a specific ascertained chattel already inspected: 2 *Schouler on Personal Property*, § 346; referring to *Bennett's Benjamin on Sales*, § 644; *Deming v. Foster*, 42 N. H. 165; *Mixer v. Coburn*, 11 Met. 559; 45 Am. Dec. 230; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Frazier v. Harvey*, 34 Conn. 463; *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676; *Wolcott v. Mount*, 36 N. J. L. 202; 13 Am. Rep. 423; S. C. 28 N. J. L. 496; 20 Am. Rep. 425; *Weimer v. Clement*, 37 Pa. St. 147; 78 Am. Dec. 411; *Morris v. Thompson*, 85 Ill. 16, 18.

7 See *Thomas v. Sexton*, 15 S. C. 93, and local authorities cited.

8 *Barnard v. Kellogg*, 10 Wall. 383. See *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. And consult note to *Reynolds v. Palmer*, 21 Fed. Rep. 440. Thus it is laid down that with reference to warranties as to quality the rule is that the law does not imply such a warranty, but the maxim is *caveat emptor*, and the purchaser has no remedy, except in case of express warranty or fraud: *Johnson v. Powers*, 65 Cal. 179. Applications of rule of *caveat emptor* in case of a specific ascertained chattel: bare affirmation



that article is bezoar-stone (*Chandelor v. Lopus*, 2 Cro. Jac. 2; 1 Smith's Lead. Cas. 238. And see *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Dec. 210, 213); fitness for intended purpose of machine whose component parts have been inspected (See *Mallan v. Radloif*, 17 Conn. B. N. S. 588); good quality of specific boat, known on both sides to be old and in want of repair (*Weimer v. Clement*, 39 Pa. St. 147; 73 Am. Dec. 411); fitness of oxen bought upon inspection to do work on a farm: *Deming v. Foster*, 42 N. H. 165. Source of these illustrations: 2 Schouler on Personal Property, § 347. And see *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Dec. 210.

9 2 Schouler on Personal Property, § 347; citing, *Parkinson v. Lee*, 2 East, 314; *Kingsbury v. Taylor*, 29 Me. 503; 50 Am. Dec. 637; *Frazer v. Harvey*, 34 Conn. 469; and referring, also, to *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504; *Hadley v. Clinton etc. Co.* 13 Ohio St. 502; 82 Am. Dec. 454; *Walker v. Pue*, 57 Md. 155. Consult further *Dickinson v. Gay*, 7 Allen, 29; 83 Am. Dec. 656, n. 663; *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, 171; later chapter on LATENT DEFECTS.

10 *Downing v. Dearborn*, 77 Me. 457, 458, 459. And when such a latent defect becomes known to the buyers, they can elect whether to retain the goods and seek their remedy for breach of warranty, or for the deceit, or to repudiate the sale and restore the articles purchased: *Downing v. Dearborn*, 77 Me. 457, 459; referring to *Marston v. Knight*, 29 Me. 341.

11 See *Story on Sales*, § 365. But compare *Lukens v. Freund*, 27 Kan. 664; 41 Am. Rep. 429, 430; *Getty v. Rountree*, 2 Penn. 379; 2 Chand. 28; 54 Am. Dec. 138, 141. And see *Howard v. Hoey*, 23 Wend. 350; 35 Am. Dec. 572, 574, n. 535; quoting, *Hargous v. Stone*, 5 N. Y. 83. Consult, also, discussion in *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, 168, 171, 172.

§ 332. Opportunity for inspection.—*Want of, etc.* The maxim *caveat emptor* does not apply where there is no opportunity to inspect the commodity,<sup>1</sup> or perhaps where from the nature of the article, or the peculiar character of the business in which it is sold, and the reliance that must be placed on the dealer as an expert, as on a sale of drugs by a druggist, it is shown that an examination would not be of any avail to the purchaser.<sup>2</sup>

*Specific existing goods.* But as to specific existing goods capable of inspection, the buyer has the opportunity of exercising his judgment upon the matter, and if the result of the inspection is unsatisfactory, or if the buyer distrusts his own judgment, he may, if he chooses, require a warranty;<sup>3</sup> and there is no implied warranty of quality as to such goods, whose actual condition is equally open to the inspection of either party.<sup>4</sup>

*Poisonous fodder for cattle.* Where without the seller's negligence, copper clasps fell into a sack of bran which had been bought for feeding cows, and were swallowed by one of the cows and poisoned and killed her, it was held that the case did not come within any of the exceptions to the rule of *caveat emptor* as to fitness for special purpose, wholesomeness of food, etc., and that the seller was not liable.<sup>5</sup>

*Conformity of goods to order.* But where a party at Mobile, Alabama, ordered from another at Council Bluffs, Iowa, through the agent of the latter at Mobile, "choice sugar-cured canvassed hams," and the buyer had no opportunity to inspect them, but they were shipped at Council Bluffs, and payment demanded and made while they were in transit, it was held that the hams were warranted to conform to the order, and that the seller was liable if they did not.<sup>6</sup>

1 Gardiner v. Gray, 4 Camp. 144; as quoted, Bennett's Benjamin on Sales, § 653. And see 2 Schouler on Personal Property, § 347; referring to Beals v. Olmstead, 21 Vt. 114; 58 Am. Dec. 150; Lord v. Grow, 50 Pa. St. 83; 80 Am. Dec. 504; Pease v. Sabin, 38 Vt. 432. Consult, also, Story on Sales, § 369.

2 Jones v. George, 56 Tex. 140; 42 Am. Rep. 689, 690.

3 Jones v. Just, Law R. 3 Q. B. 197.

4 2 Schouler on Personal Property, § 347; citing, Turner v. Mucklow, 8 Jur. N. S. 879; explained in Jones v. Just, Law R. 3 Q. B. 197; Barr v. Gibson, 3 Mees. & W. 320; stated and quoted, Bennett's Benjamin on Sales, §§ 646, 647; Frazier v. Harvey, 34 Conn. 469; Rocchi v. Schwabacher, 33 La. An. 1364; Slaughter v. Gerson, 13 Wall. 579. Consult, also, 2 Corbin's Benjamin on Sales, § 966, n. 23; considering, Carson v. Baillie, 19 Pa. St. 375, 380; 57 Am. Dec. 659; Lord v. Grow, 39 Pa. St. 388; 80 Am. Dec. 504; Byrne v. Jansen, 50 Cal. 624; Hunger v. Evans, 38 Ark. 334, 340. And compare Brantley v. Thomas, 22 Tex. 270; 73 Am. Dec. 264, 266.

5 Lukens v. Frelund, 27 Kan. 664; 41 Am. Rep. 429. But compare French v. Vining, 102 Mass. 132; 3 Am. Rep. 440.

6 Forcheimer v. Stewart, 65 Iowa, 504; 54 Am. Rep. 30, 35. And consult Brantley v. Thomas, 22 Tex. 270; 73 Am. Dec. 264, 266.

§ 333. *Implied warranty of quality.*—*In general.* There are various recognized cases, at least originally regarded as exceptional, where a warranty of quality is implied in sales of personal property.<sup>1</sup>

*On sales by sample.* Thus in the case of sales by sample,<sup>2</sup> there is an implied warranty that the bulk shall correspond with the sample.<sup>3</sup>

*On sale by description.* So on a sale of an article by a particular designation or description, there is an implied warranty or undertaking,<sup>4</sup> whose scope is not always definitely determined, of correspondence with such designation or description.<sup>5</sup>

*Of fitness for intended purpose.* And in the case of an unascertained chattel, or where a chattel is to be made or supplied to the purchaser's order, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given.<sup>6</sup>

*Of merchantable character of goods.* Furthermore, in the case of goods not inspected by the buyer, and particularly where the sale is by description, there is generally considered to be an implied warranty or undertaking that they are of a merchantable character.<sup>7</sup>

*Wholesomeness of provisions.* So the law is frequently expressed to be that on a sale of provisions for domestic use, there is an implied warranty that they are sound and wholesome.<sup>8</sup>

*Supplying exact thing ordered.* But the law is declared to be well settled that when a known, described, and defined article is ordered, even of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, yet if the known, defined, and described thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer,<sup>9</sup> but in such case the purchaser takes upon himself the risk of its effecting its purpose.<sup>10</sup> And where the contract was to supply Keystone coal,

fine, and the run of the mine, and there was nothing else in the terms of the contract to indicate the quality stipulated for, it was held that there was no foundation for an implied warranty, as when the coal was delivered the buyer had ample opportunity to ascertain the quality by an inspection.<sup>11</sup>

*Sale of specific fertilizer, etc.* So on a sale of a specific fertilizer, there is in the absence of fraud, usually, no implied warranty of quality,<sup>12</sup> except so far as such a warranty may arise under the statutes of some of the States.<sup>13</sup>

1 See succeeding paragraphs of section. And compare *Jones v. Just*, Law R. 3 Q. B. 197; *Getty v. Rountree*, 2 Pinn. 373; 2 Chand. 138; 54 Am. Dec. 138, 140; note to *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Otto v. Alderson*, 10 Smedes & M. 476, 481; *Story on Sales*, § 265; *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Rep. 429, 430; *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. Warranty implied from usage of trade: 22 Am. Law Reg. N. S. 236, or *Biddle on Chattel Warranties*, §§ 219, 223; reviewing *Clark v. Baker*, 11 Met. 186; 45 Am. Dec. 199; *Snowden v. Warden*, 3 Rawle, 101; *Fatman v. Thompson*, 2 Disn. 482; *Boorman v. Jenkins*, 12 Wend. 566; 27 Am. Dec. 153; *Dodd v. Farlow*, 11 Allen, 426; *Wetherill v. Neilson*, 20 Pa. St. 448; 59 Am. Dec. 741; *Barnard v. Kellogg*, 19 Wall. 383.

2 There may be what is termed *falsa demonstratio*, as in the sale of goods by samples: *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. Sale by sample discussed: *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264, 265, 266, n. 263; *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 723; note to *Bradford v. Manly*, 13 Mass. 133; 7 Am. Dec. 125-132; note to *Brigg v. Hilton*, 3 N. E. Rep. 58; *Reynolds v. Palmer*, 21 Fed. Rep. 433, 435, n. 454.

3 See *Bradford v. Manly*, 13 Mass. 133; 7 Am. Dec. 122, n. 125; *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264, 265, 266; 1 *Parsons on Contracts*, 585; *Parker v. Palmer*, 4 Barn. & Ald. 357; *Parkinson v. Lee*, 2 East, 314; *Campbell on Sales*, 305; *Bennett's Benjamin on Sales*, § 648; 2 *Corbin's Benjamin on Sales*, § 967, n. 26; *Story on Sales*, § 376; *Lukens v. Freilund*, 27 Kan. 634; 41 Am. Rep. 429, 430; 2 *Schouler on Personal Property*, § 200; citing, *Williams v. Spafford*, 8 Pick. 250; *Beirne v. Dord*, 1 Seld. 95; 55 Am. Dec. 321; *Gunther v. Atwell*, 19 Md. 157; *Hanson v. Busse*, 45 Ill. 436; *Day v. Raguet*, 14 Minn. 273. But see *Boyd v. Wilson*, 83 Pa. St. 319; 24 Am. Rep. 176; *Mining Co. v. Jones*, 108 Pa. St. 55, 65.

4 See *Norrington v. Wright*, 115 U. S. 188, 203; 6 Sup. Ct. Rep. 12; 25 Am. Law Reg. N. S. 47; *Filley v. Pope*, 115 U. S. 213, 219; 6 Sup. Ct. Rep. 19; *Pope v. Allis*, 115 U. S. 363, 372; 6 Sup. Ct. Rep. 69.

5 See *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280, 281, 282; *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 433, 440-442; S. C. 38 N. J. L. 457; 20 Am. Rep. . . . And consult *Hawkins v. Pemberton*, 51 N. Y. 198, 204; 10 Am. Rep. 595; *Henshaw v. Robins*, 9 Met. 83; 43 Am. Dec. 367, n. 372; *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85; *Osgood v. Lewis*, 2 Har. & G. 495; 18 Am. Dec. 317; 2 *Schouler on*

Personal Property, § 249, making these citations; 2 Corbin's Benjamin on Sales, § 566, n. 24; *Bach v. Levy*, 101 N. Y. 511, 514; 5 N. E. Rep. 345. Compare *Forchheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30, 35; *Maxwell v. Lee*, 27 N. W. Rep. (Minn.) 196; 21 The Reporter, 727.

6 See Bennett's Benjamin on Sales, § 645; 2 Schouler on Personal Property, § 343; 22 Am. Law Reg. N. S. 225. Consult further, note to *Reynolds v. Palmer*, 21 Fed. Rep. 443; *Jones v. Just*, Law R. 3 Q. B. 197; *Randali v. Newson*, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 233; *Bragg v. Morrill*, 49 Vt. 45; 24 Am. Rep. 102, n. 104; *Lukens v. Freund*, 27 Kan. 664; 41 Am. Rep. 429, 431; *Port Carbon Iron Co. v. Groves*, 63 Pa. St. 149, 151; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Getty v. Rountree*, 2 Pinn. 373; 2 Chand. 23; 54 Am. Dec. 153, 141; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737, 744; *Beals v. Olmstead*, 24 Vt. 114; 53 Am. Dec. 150; *Best v. Flint*, 58 Vt. 543; 56 Am. Rep. 570, 572; *Bartlett v. Hoppock*, 34 N. Y. 118; 88 Am. Dec. 428, 431.

7 See note to *Reynolds v. Palmer*, 21 Fed. Rep. 441; *Gardiner v. Gray*, 4 Camp. 144; *Jones v. Just*, Law R. 3 Q. B. 137; *Merriam v. Field*, 24 Wis. 640; 29 Wis. 640; 29 Wis. 533; 39 Wis. 573; Bennett's Benjamin on Sales, §§ 656-660; 2 Corbin's Benjamin on Sales, § 563, n. 32; 2 Schouler on Personal Property, §§ 354-357. Thus it is said to have been held that under a contract to supply goods of a specified description, which the buyer has had no opportunity of inspecting, the goods must not only in fact correspond to the specific description, but must be salable or merchantable under that description: *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. And consult *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305, 307, n. 312; *Kohl v. Lindley*, 39 Ill. 195; 89 Am. Dec. 294, 301; *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210, 211.

8 See *Lukens v. Freund*, 27 Kan. 664; 41 Am. Rep. 429, 432; note to *Reynolds v. Palmer*, 21 Fed. Rep. 449; *Van Bracklin v. Fonda*, 12 Johns. 468; 7 Am. Dec. 329; referring to note to *Emerson v. Brigham*, 10 Mass. 127; 6 Am. Dec. 117. And consult full discussion of subject in note to *Hunter v. State*, 1 Head, 160; 73 Am. Dec. 165.

9 See citations in next note.

10 *Rasin v. Conley*, 58 Md. 65; as stated, *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253; declaring rule of *caveat emptor* to have been sanctioned in *Hyatt v. Boyle*, 5 Gill & J. 120; 25 Am. Dec. 273; *Gunther v. Atwell*, 19 Md. 171; *Rice v. Forsyth*, 41 Md. 404. And see note to *Reynolds v. Palmer*, 21 Fed. Rep. 446.

11 *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253; relying upon *Jones v. Just*, Law R. 3 Q. B. 197.

12 *Walker v. Pue*, 57 Md. 155.

13 *Wilcox v. Owens*, 64 Ga. 601. And see *Jones v. George*, 56 Tex. 149; 42 Am. Rep. 689; S. C. 61 Tex. 345; 48 Am. Rep. 280; 2 Schouler on Personal Property, § 347, p. 344, n. Sale of defective or second-hand chattel as such: *Loop v. Litchfield*, 42 N. Y. 351; 1 Am. Rep. 543; 2 Schouler on Personal Property, § 363; referring, also, to *Holden v. Clancy*, 58 Barb. 590. And see *Lukens v. Freund*, 27 Kan. 664; 41 Am. Rep. 429, 433, 434. Express warranty may sometimes re-enforce implied (See *Bigge v. Parkinson*, 7 Hurl. & N. 555); but generally excludes implied: See *Parkinson v. Lee*, 2 East, 314; *Dickson v. Ziziana*, 10 Com. B. 602; Bennett's Benjamin on Sales, § 662; 2 Schouler on Personal Property, § 367; citing, also, *Deming v. Foster*, 42 N. H. 165.



## CHAPTER XXV.

## SALES BY SAMPLE.

- § 334. Exhibition of sample.
- § 335. Opportunity to examine bulk.
- § 336. Scope of warranty or undertaking.
- § 337. Conclusiveness of acceptance.
- § 338. Finality of inspection.
- § 339. Liability of manufacturer.
- § 340. Buyer's remedies.

§ 334. **Exhibition of sample.**— *Correspondence of bulk with sample.* A sale by sample is said to be made where a small quantity of any commodity is exhibited by the vendor as a fair specimen of a larger quantity called the bulk, which is not present, and there is no opportunity for a personal examination.<sup>1</sup> And one of the most general of implied warranties in sales of personal property, is that of correspondence of the bulk with the sample,<sup>2</sup> in the case of sales by sample.<sup>3</sup>

*When does not make sale by sample.* But the mere exhibition of a sample at the time of the sale, does not necessarily make the transaction a sale by sample,<sup>4</sup> so as to subject the seller to an implied warranty as to the nature and quality of the goods;<sup>5</sup> for the sample may be exhibited merely to enable the purchaser to form a judgment upon the character of the commodity,<sup>6</sup> and the production of the sample may amount only to a representation that the sample exhibited has been taken from the bulk of the commodity in the usual way.<sup>7</sup> So the vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk;<sup>8</sup> or the buyer may decline to trust to the sample and the implied warranty, and require an express warranty,<sup>9</sup> which excludes any implied warranty.<sup>10</sup>

*When makes sale by sample.* But if the contract be connected with the sample by the circumstances attending the sale, and refer to the sample, which is exhibited as an inducement to the contract, the transaction may be a sale by sample,<sup>11</sup> so that as a necessary consequence the seller warrants the bulk of the goods to correspond with the specimen exhibited as a sample.<sup>12</sup> And it is said that there must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be by sample.<sup>13</sup>

*Question for jury.* Whether a sale be a sale by sample or not, is a question of fact for the jury to find from the evidence in each case;<sup>14</sup> and to authorize such a finding, it is said that the evidence must satisfactorily show that the parties contracted with sole reference to the sample exhibited.<sup>15</sup>

1 Reynolds v. Palmer, 21 Fed. Rep. 428, 435. But compare *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; § 335, on OPPORTUNITY TO EXAMINE BULK. And consult 2 Bouvier Law Dict. (15th ed.) 611; Winfield's Words etc. 551; quoting, *Webber's Case*, 33 Gratt. 904.

2 See *Bradford v. Manly*, 13 Mass. 138; 7 Am. Dec. 122, 123, with note, 125; *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264, 265, 266.

3 See *Parker v. Palmer*, 4 Barn. & Ald. 387; *Parkinson v. Lee*, 2 East, 314; *Bennett's Benjamin on Sales*, § 638; referring, also, to *Azemar v. Casella*, Law R. 2 Com. P. 446, and *McMullen v. Helberg*, 4 Law R. Ir. 100. Consult, also, *Campbell on Sales*, 305; 22 Am. Law Reg. N. S. 239; *Story on Sales*, § 376; 2 *Schouler on Personal Property*, § 360; citing, *Gunther v. Atwell*, 19 Md. 157; *Williams v. Spafford*, 8 Pick. 250; *Day v. Raguett*, 14 Minn. 273; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; *Hanson v. Busse*, 45 Ill. 436. But compare *Boyd v. Wilson*, 83 Pa. St. 319; 24 Am. Rep. 176; *Mining Co. v. Jones*, 108 Pa. St. 55, 65.

4 *Hargous v. Stone*, 5 N. Y. 73, 85. And see *Barnard v. Kellogg*, 6 Blatchf. 279; 19 Wall. 383; *Arnes v. Jones*, 77 N. Y. 614; *Atwater v. Clancy*, 107 Mass. 203; note to *Bradford v. Manly*, 7 Am. Dec. 126; note to *Reynolds v. Palmer*, 21 Fed. Rep. 455.

5 *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321.

6 See *Gardiner v. Gray*, 4 Camp. 144; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321.

7 *Hargous v. Stone*, 5 N. Y. 73, 85.

8 Compare *Salisbury v. Stalner*, 19 Wend. 159; 32 Am. Dec. 457.

9 Sale by sample itself claimed to constitute an express warranty: Note to *Bradford v. Manly*, 7 Am. Dec. 126.

10 See *McMullen v. Helberg*, 4 Law R. Ir. 100; *Tye v. Flumore*, 3 Camp. 432; *Powell v. Horton*, 2 Bing. N. C. 663. Absence of reference to sample in memorandum of contract: *Meyer v. Liverth*, 4 Camp. 22.

11 *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321. And see *Day v. R. guet*, 14 Minn. 273.

12 *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321.

13 *Hargous v. Stone*, 5 N. Y. 73, 85. To constitute a sale by sample, it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing with regard to the quality of the bulk: *Reynolds v. Palmer*, 21 Fed. Rep. 433, 435. And see *Day v. Raguét*, 14 Minn. 273, 282.

14 See *Atwood v. Clancy*, 107 Mass. 369. Parol evidence to show that sale was by sample: See *Bradford v. Manly*, 13 Mass. 128; 7 Am. Dec. 122, 123, n. 129.

15 *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321. The evidence must show that the parties mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it; or in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was intended by the parties as a sale by sample: *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321. And see *Day v. Raguét*, 14 Minn. 273. Consult further upon subject of section, following sources of most of foregoing matter: 22 Am. Law Reg. N. S. 243, 244, or *Biddle on Chattel Warranties*, §§ 213-218; *Bennett's Benjamin on Sales*, § 649; 2 *Corbin's Benjamin on Sales*, § 970, n. 27. And see *Campbell on Sales*, 367; *Story on Sales*, § 576; 2 *Schouler on Personal Property*, § 359; note to *Reynolds v. Palmer*, 21 Fed. Rep. 455; note to *Bradford v. Manly*, 7 Fed. Dec. 126.

§ 335. **Opportunity to examine bulk.**—*Examination not practicable or convenient.*<sup>1</sup> It furnishes no sufficient ground of itself to say that a sale is by sample, because a personal examination of the bulk of the goods by the purchaser at the time of sale is not practicable or convenient.<sup>2</sup> For though the want of an opportunity, from whatever cause, for such an examination, is doubtless a strong fact in reference to the question of the character of the sale, as to whether it is made by sample or not, yet it is nevertheless true that a contract of sale by sample may be made, whether such examination be practicable or not, if the parties so agree.<sup>3</sup>

*Examination of sample as essence of transaction.* And if the examination merely of the sample be shown to be the point on which the transaction turns, there may be a sale by sample, although the chattels in bulk were where the buyer might have inspected them, or the sample was drawn by the seller from the bulk in



the buyer's presence, or the buyer even inspected the bulk pending the negotiation in a casual way, and without relying upon such inspection as the inducement of his purchase, or being understood so to rely.<sup>4</sup>

1 Sales by sample are commonly made when it is not convenient for the purchaser to see the bulk of the commodity, and one of the main reasons why the law implies a warranty is said to be that there is not an opportunity for a personal examination of the article which the sample is shown to represent: *Reynolds v. Palmer*, 21 Fed. Rep. 433, 435. And see note to *Bradford v. Manly*, 7 Am. Dec. 129.

2 *Beirne v. Dord*, 5 N. Y. 95 ; 54 Am. Dec. 321.

3 *Beirne v. Dord*, 5 N. Y. 95 ; 55 Am. Dec. 321. But where the acts and declarations of the parties in making the contract for the sale of the goods are of doubtful construction, evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and in connection with evidence of other circumstances attending the transaction, might aid in coming to a correct conclusion in respect to the true character of the contract: *Beirne v. Dord*, 5 N. Y. 95 ; 55 Am. Dec. 321. See quotation of this case in 22 Am. Law Reg. N. S. 244, or *Biddle on Chattel Warranties*, § 213.

4 2 *Schouler on Personal Property*, § 353. And compare *Williams v. Spafford*, 8 Pick. 259, with *Salisbury v. Haines*, 19 Wend. 159 ; 32 Am. Dec. 437.

§ 336. **Scope of warranty or undertaking.**—*Correspondence in quality.* By offering the specimen or sample alone for present inspection, the seller undertakes to assure the buyer that the bulk will be found like it in kind and quality.<sup>1</sup> Thus in a sale of goods by sample,<sup>2</sup> a warranty is quite universally held to be implied, that the bulk shall correspond in quality with the sample.<sup>3</sup>

*Correspondence in kind.* And there is said to be in the case of unascertained goods, the further undertaking by the seller,<sup>4</sup> sometimes regarded as a condition rather than a warranty,<sup>5</sup> that the bulk shall correspond with the sample in kind<sup>6</sup> and character.<sup>7</sup>

*Opportunity of comparison.* So it is an implied term of the contract that the buyer shall have a fair opportunity to compare the bulk with the sample,<sup>8</sup> so as to test the substantial correspondence between them in nature and quality.<sup>9</sup>

*Merchantable character.* But in Pennsylvania, the peculiar doctrine<sup>10</sup> seems to be maintained that a sale of chattels by the production of a sample, in the absence of fraud or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality, but the sample merely becomes a guaranty that the articles to be delivered shall follow its kind and be simply merchantable,<sup>11</sup> though a stipulation that the quality of ore to be delivered should be up to sample, may become a term of the contract and enforceable as such.<sup>12</sup> And on a sale by sample, there may also be an implied warranty of merchantable character deducible from the facts and circumstances of the case.<sup>13</sup>

*Warranty concerning analysis.* So in a sale of guano, where the buyer had asked for a "guaranteed analysis" to accompany the sample, and a printed analysis signed by the vendor had been sent with the sample, the vendor was held to have warranted not only that the bulk was equal to sample, but that the analysis, at the time it was made, was a fair analysis of the bulk out of which the guano was supplied.<sup>14</sup>

*Mistake in drawing sample.* And where by mistake a sample was taken from the cargo of the wrong vessel, it was held that as the vendor intended to sell one bulk, and the purchaser to buy another, there was no contract between them.<sup>15</sup>

*"Average sample."* In the case of sales by "average sample," where samples or specimens drawn from various packages are mixed by the seller, there is no right of rejection or recovery of purchase price because some of the packages are inferior to the average; but the true test is whether, if the contents of all the packages were mixed together, the quality of the bulk so formed would equal the average sample.<sup>16</sup>

1 2 Schouler on Personal Property, § 360. Thus it is said that strictly speaking in a contract of sale by sample there is not a warranty of quality, but an agreement of the seller to deliver, and of the buyer to accept goods of the same kind and quality with the sample: *Gunther v. Atwell*, 19 Md. 157. So it is declared that when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited: *Pope v. Allis*, 115 U. S. 363, 372; 6 Sup. Ct. Rep. 69, 72, 73. Construction of written contract in favor of view that bulk of cargo corresponds with samples: *Russel v. Nicolopulo*, 8 Com. B. N. S. 362.

2 See generally note to *Dickinson v. Gay*, 83 Am. Dec. 663.

3 See *Parker v. Palmer*, 4 Barn. & Ald. 357; *Parkinson v. Lee*, 2 East, 314; *Williams v. Spafford*, 8 Pick. 250; *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; *Gunther v. Atwell*, 19 Md. 157; *Hanson v. Busse*, 45 Ill. 496; *Day v. Raguette*, 14 Minn. 273. Sources of these citations: 2 Schouler on Personal Property, § 360. And see *Bennett's Benjamin on Sales*, § 648; 2 *Corbin's Benjamin on Sales*, § 969, n. 26; *Story on Sales*, § 276; 22 Am. Law Reg. N. S. 239, or *Biddle on Chattel Warranties*, § 208; note to *Reynolds v. Palmer*, 21 Fed. Rep. 454.

4 See *Gunther v. Atwell*, 19 Md. 157.

5 Compare *Campbell on Sales*, 306.

6 See *Bradford v. Manly*, 13 Mass. 138; 7 Am. Dec. 122.

7 2 Schouler on Personal Property, § 360. And see *Bannerman v. Wright*, 10 Com. B. N. S. 844. Consult, also, *Azemar v. Casella*, Law R. 2 Com. P. 431, 677; *Buck v. Levy*, 101 N. Y. 511, 514; 5 N. E. Rep. 345. But compare *Carter v. Crick*, 4 Hurl. & N. 412.

8 See *Lorymer v. Smith*, 1 Barn. & C. 1.

9 2 Schouler on Personal Property, § 360. And see *Bennett's Benjamin on Sales*, § 648. If the buyer refuses to accept goods sold by sample, the seller in a suit for the price, must prove that the goods tendered were equal to the sample: *Merriman v. Chapman*, 32 Conn. 146; as stated, 2 *Corbin's Benjamin on Sales*, § 923, n. 26.

10 See *Mining Co. v. Jones*, 108 Pa. St. 55, 65.

11 *Boyd v. Wilson*, 83 Pa. St. 319; 24 Am. Rep. 376; as quoted, 22 Am. Law Reg. N. S. 240, or *Biddle*, also, *Chattel Warranties*, § 209. Deducing result from following cases: *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85; *Jennings v. Gratz*, 3 Rawle, 168; 23 Am. Dec. 111; *Kirk v. Nice*, 2 Watts, 367; *McFarland v. Newman*, 9 Watts, 55; 34 Am. Dec. 497; *Fraley v. Bispham*, 10 Pa. St. 320; 51 Am. Dec. 486; *Carson v. Baillie*, 19 Pa. St. 375; 57 Am. Dec. 659; *Wetherill v. Neilson*, 20 Pa. St. 448; 59 Am. Dec. 741; *Eagan v. Call*, 34 Pa. St. 236; 75 Am. Dec. 653; *Weimer v. Clement*, 1 Wright, 147; *Whitaker v. Eastwick*, 75 Pa. St. 229. See note to *Bradford v. Manly*, 7 Am. Dec. 127.

12 *Mining Co. v. Jones*, 108 Pa. St. 55, 64-66.

13 See *Moody v. Gregson*, Law R. 4 Ex. 49. And consult note to *Bradford v. Manly*, 7 Am. Dec. 128, 129; note to *Reynolds v. Palmer* 21 Fed. Rep. 454.

14 *Towerson v. Aspatia Agricultural Society*, 27 L. T. N. S. 276.

15 *Megaw v. Molloy*, 2 Law R. Ir. 530. See statements of these cases in *Bennett's Benjamin on Sales*, §§ 650 a, 667.

16 See *Leonard v. Fowler*, 44 N. Y. 289; 2 Schouler on Personal Property, § 271; *Bennett's Benjamin on Sales*, § 654; citing, also, *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

§ 337. *Conclusiveness of acceptance.*— *After final examination.* In a sale of goods by sample, the rights of the buyer under the contract are concluded after he has made such final examinations as he thinks fit, no matter how careless in character, and knowingly accepted the goods as being of the kind and quality called for by the contract.<sup>1</sup>

*Fraudulent prevention or hindrance of examination.* But the buyer's rights under the contract are left unimpaired by any acceptance which is induced by fraud or artifice, such as prevented or hindered a proper examination.<sup>2</sup>

*Acceptance of part.* Nor can the buyer's acceptance of part on delivery, as corresponding with the sample, prevent him from rejecting what is subsequently delivered under the same contract.<sup>3</sup>

*Under executory contracts.* So where there was an executory contract for the sale of cloths by samples which were sound and perfect, the cloths being represented to be of similar fabric and similar quality, equal in every respect to the samples, it was held that acceptance of the cloths after opportunity for their examination did not preclude a claim and recovery of damages for breach of warranty.<sup>4</sup> And the doctrine that a warranty upon an executory contract of sale survives acceptance,<sup>5</sup> has also been applied to an action to recover damages for breach of warranty upon a sale of tobacco by sample, where it was represented that the sample was a true sample of the tobacco sold, and that the tobacco was not only as good as the sample, but good, sound, and all right.<sup>6</sup>

1 See *McCormick v. Sarson*, 45 N. Y. 265 ; 6 Am. Rep. 80 ; *Dutchess Co. v. Harding*, 49 N. Y. 321 ; *Morse v. Brackett*, 95 Mass. 205 ; *Carson v. Baillie*, 19 Pa. St. 375 ; 57 Am. Dec. 659 ; *Barnard v. Kellogg*, 10 Wall. 383 (false packing) ; 2 Schouler on Personal Property, § 362 ; referring, also, to *Pennock v. Stygles*, 54 Vt. 226.

2 See *Dutchess Co. v. Harding*, 49 N. Y. 321 ; *Mody v. Gregson*, Law R. 4 Ex. 49.

3 *Hubbard v. George*, 49 Ill. 275 ; as stated, 2 Schouler on Personal Property, § 362, whence preceding paragraph also derived. And see *Farmer v. Gray*, 20 Neb. 401, 403.

4 *Briggs v. Hilton*, 99 N. Y. 517 ; 52 Am. Rep. 63.

5 *Briggs v. Hilton*, 99 N. Y. 517 ; 52 Am. Rep. 63.

6 *Kent v. Friedman*, 101 N. Y. 616 ; 3 N. E. Rep. 905 ; affirming, 30 Hun, 222, *mem.*

§ 338. **Finality of inspection.**—*By official inspector.* Under some circumstances, it may be a reasonable inference from the contract that the sale shall take full effect upon the completion of inspection by some third person, such as an official inspector, without awaiting any special examination by the buyer himself.<sup>1</sup>

*Subsequent to original delivery.* And in a case of a contract between private parties for the sale by manufacturers of shoes for army use, where the soles turned out to contain paper, it was laid down that if the time of inspection, as agreed on, be subsequent to the time agreed upon for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such stipulated time and place, if the goods be not equal to the sample, return them then and there on the hands of the seller.<sup>2</sup>

1 See *Gunther v. Atwell*, 19 Md. 157.

2 *Heilbutt v. Hickson*, Law R. 7 Com. P. 438 ; 3 Eng. Rep. 328 ; stated at length, Bennett's Benjamin on Sales, § 651. Basis of foregoing matter: 2 Schouler on Personal Property, § 363, referring to the same head the following case, where bullets were sold to State authorities under an agreement which allowed an opportunity for full inspection of the property, even after its formal delivery: *Messmore v. N. Y. Shot Co.* 40 N. Y. 422.

§ 339. **Liability of manufacturer.**—*Fraudulent knowledge of defects.* In regard to the bearing of intentional fraud upon sample sales of defective goods, there seems to be a distinction in favor of an inference of knowledge of defects in the case of a manufacturer or grower as distinguished from a dealer supplying goods.<sup>1</sup>

*Unknown and undiscoverable defect.* And the statement has been made that if a manufacturer agrees to furnish goods according to sample, the sample is to be considered free from a secret defect not discoverable on inspection, and unknown to both parties.<sup>2</sup>

*Goods rendered unmerchantable.* Where shirtings sold by sample by a manufacturer were so weighted by clay as to be unmerchantable, it was maintained by the court that under the peculiar circumstances of the case, the sale carried with it an implied warranty of merchantable quality, besides that of correspondence with the sample.<sup>3</sup>

1 Compare *Heilbutt v. Hickson*, Law R. 7 Com. P. 438, 3 Eng. Rep. 328, with *Barnard v. Kellogg*, 10 Wall. 383. Consult, further, *Lickinson v. Gay*, 7 Allen, 29; 83 Am. Dec. 656, 658. And see generally, *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, 175; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13, 17; S. C. 78 N. Y. 393; 34 Am. Rep. 541. Seller's knowledge of defects; See note to *Bradford v. Manly*, 7 Am. Dec. 127.

2 See *Bennett's Benjamin on Sales*, § 651; reviewing *Heilbutt v. Hickson*, Law R. 7 Com. P. 438; 3 Eng. Rep. 328. And consult generally, *Randall v. Newsom*, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 243; *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, 175.

3 See *Mody v. Gregson*, Law R. 4 Ex. 47; as stated, 2 Schouler on Personal Property, § 364, whence foregoing paragraph also derived.

§ 340. **Buyer's remedies.**—*Right of returning goods, etc.* Among the incidents attaching to a sale by sample is this, that such contract always contains an implied term that the goods may under certain circumstances be returned,<sup>1</sup> or sold by the purchaser, if the purchaser will not accept a return.<sup>2</sup>

*Mode of rejection.* Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it has been said to be his duty to make a distinct offer to return, or in fact, to return the goods by stating to the vendor that the goods are at his risk, and that they no longer belong to the purchaser, but that the purchaser rejects them, and throws them back on the seller's hands, and

that the contract is rescinded.<sup>3</sup> But where the sale is by sample, and inspection is to be at some place after delivery, it has been considered that if the goods are found on such inspection not to be equal to sample, the purchaser has a right to reject them then and there,<sup>4</sup> for which purpose no particular form is essential, but it is sufficient if he does any unequivocal act showing that he rejects them;<sup>5</sup> and that though he may in fact return them, or offer to return them, yet the more usual course is to signify his rejection of them by stating that the goods are not according to the contract, and that they are at the vendor's risk.<sup>6</sup>

*Effect of acceptance.* In New York, in a case where the contract was for the sale of sumac, "quality to be like sample in every respect," and the buyer inspected part of the lot tendered and accepted the whole, but afterwards sued for damages for breach of warranty, it was held that under such circumstances the vendee must immediately rescind the contract, and return, or offer to return the goods, or he will be foreclosed from all claim;<sup>7</sup> and that he cannot retain the property, and afterwards sue for damages on account of the inferior quality.<sup>8</sup> But later cases in the same State have modified the former rule, so that an action or defense may be sustained on the warranty implied in a sale by sample, or on an express warranty in an executory contract of sale,<sup>9</sup> though the buyer accepts and does not offer to return the goods.<sup>10</sup> And the latest cases apply to a sale by sample the doctrine that a warranty upon an executory contract of sale survives acceptance.<sup>11</sup>

1 *Hellbutt v. Hickson*, Law R. 7 Com. P. 438; 3 Eng. Rep. 323. And see *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187; *Bennett's Benjamin on Sales*, § 651; citing, also, *Freeman v. Clute*, 3 Barb. 424; *Parke v. Morris Axe Co.* 4 Lans. 103.

2 *Messmore v. N. Y. Shot Co.* 40 N. Y. 422; as noted, *Bennett's Benjamin on Sales*, § 651. If goods sold by sample do not correspond with the sample, the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination,

and thus rescind the contract: *Pope v. Allis*, 115 U. S. 363, 372; citing, *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Allen, 679.

3 *Couston v. Chapman*, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187. And consult § 263, on BUYER'S COURSE ON REJECTION.

4 See *Heilbutt v. Hickson*, Law R. 7 Com. P. 438; 3 Eng. Rep. 423.

5 *Grimoldby v. Wells*, Law R. 10 Com. P. 391; 12 Eng. Rep. 451.

6 *Grimoldby v. Wells*, Law R. 10 Com. P. 391; 12 Eng. Rep. 451. See Bennett's Benjamin on Sales, § 652 *a*; citing, also, *Lucy v. Mouflet*, 5 Hurl. & N. 233; *Gill v. Kaufman*, 16 Kan. 571; *Brown v. Corp. of Lindsay*, 35 Up. Can. Q. B. 509.

7 *Dutchess Co. v. Harding*, 49 N. Y. 321. And see *Barton v. Kane*, 17 Wis. 33; 84 Am. Dec. 723, 731.

8 *Dutchess Co. v. Harding*, 49 N. Y. 321. Compare *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264, 267. So as to acceptance of unmerchantable goods: See *Reed v. Randall*, 29 N. Y. 358, 368; 86 Am. Dec. 305; *Sprague v. Blake*, 20 Wend. 61.

9 See *Day v. Pool*, 52 N. Y. 416.

10 See *Gurney v. Atlantic Ry. Co.* 58 N. Y. 358; *Gautier v. Douglass etc. Co.* 13 Hun, 514; 2 Corbin's Benjamin on Sales, § 977, n. 29; stating, also, *Marshuetz v. McGreevy*, 23 Hun. 408.

11 See *Briggs v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; *Kent v. Friedman*, 101 N. Y. 616; 3 N. E. Rep. 905; § 337, on CONCLUSIVENESS OF ACCEPTANCE.



## CHAPTER XXVI.

## SALES BY DESCRIPTION.

- § 341. Seller's liability.
- § 342. Undertaking as condition or warranty.
- § 343. Remedies as affecting construction.
- § 344. Liability of manufacturer.
- § 345. Words of description.

§ 341. **Seller's liability.**—*Nature of undertaking.* Without express warranty or actual fraud, every person who sells goods of a certain denomination or description, undertakes as part of his contract that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality thus expressed in the contract of sale.<sup>1</sup> Such an undertaking is usually treated as a warranty, because the description of the article is deemed a representation that it answers the description.<sup>2</sup> But it is sometimes regarded as a condition,<sup>3</sup> or rather as an engagement whose breach constitutes a non-performance of the contract.<sup>4</sup>

*Agreement to fill order.* And where a vendor agrees to fill an order sent for an article of a particular quality, his liability is the same as when the proposition to sell an article of that description comes from him in the first instance, and he is liable if the goods sent do not correspond with the description.<sup>5</sup>

*Doctrine governing sales by description.* The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, has been sustained<sup>6</sup> by various English cases,<sup>7</sup> and has been generally approved by decisions in the courts of this country.<sup>8</sup> But it was

formerly held in New York, that no warranty whatever would arise from a description of the article sold.<sup>9</sup>

1 Winsor v. Lombard, 18 Pick. 57, 60; relying upon Hastings v. Lovering, 2 Pick. 214; 13 Am. Dec. 420; Hogins v. Plympton, 11 Pick. 97.

2 Bagley v. Cleveland Rolling Mill Co. 21 Fed. Rep. 159, 162.

3 See Pope v. Allis, 115 U. S. 363, 371, 372.

4 See Jones v. George, 61 Tex. 345; 48 Am. Rep. 280, 281; Bagley v. Cleveland Rolling Mill Co. 21 Fed. Rep. 159, 162. And consult Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438, 441, 442.

5 Bagley v. Cleveland Rolling Mill Co. 21 Fed. Rep. 159, 163; citing, Dalley v. Green, 15 Pa. St. 118.

6 According to Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438, 442.

7 See Powell v. Horton, 2 Bing. N. C. 663; Barr v. Gibson, 3 Mees. & W. 390; Chantler v. Hopkins, 4 Mees. & W. 399; Nichol v. Godts, 10 Ex. 191; Gompertz v. Bartlett, 2 El. & B. 849; Azemar v. Casella, 2 Com. P. 431, 677; Bridge v. Wain, 1 Stark. 504 (scarlet cuttings); Allen v. Lake, 18 Q. B. 560 ("Skirving's Swedes" turnip seeds); Josling v. Kingsford, 13 Com. B. N. S. 447 (oxalic acid); Wieler v. Shillizi, 17 Com. B. 619 (Calcutta linseed).

8 See Henshaw v. Robins, 9 Met. 83; 43 Am. Dec. 367; Borrekens v. Bevan, 3 Rawle, 23; 23 Am. Dec. 85; Osgood v. Lewis, 2 Har. & G. 475; 18 Am. Dec. 317; Hawkins v. Pemberton, 51 N. Y. 198; 10 Am. Rep. 595; Pope v. Allis, 115 U. S. 363, 372.

9 See Seixas v. Woods, 2 Caines, 48; 2 Am. Dec. 215; Snell v. Moses, 1 Johns. 96; Swett v. Colgate, 20 Johns. 196; 11 Am. Dec. 263; as cited in support of text in Wolcott v. Mount, 32 N. J. L. 262; 13 Am. Rep. 438, 440. But see Hawkins v. Pemberton, 51 N. Y. 198, 204; 10 Am. Rep. 595.

§ 342. *Undertaking as condition or warranty.*—*As warranty.* There is said to be no doubt that in a contract of sale, words of description are held to constitute a warranty that the articles sold are of the species and quality so described.<sup>1</sup> But in the later English cases, and in various American decisions, some criticism has been made of the application of the term "warranty" to representations in contracts of sale, descriptive of articles which are known in the market by such description.<sup>2</sup>

*As contract.* And it has been said that in many cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract, a breach of warranty,

while it would be better to distinguish such cases, as where a party offers to buy an article of one kind, and the other party sends him an article of an entirely different kind, as a non-compliance with the contract which the party has engaged to fulfill.<sup>3</sup>

*As condition.* So it is laid down that when the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract;<sup>4</sup> because the existence of those qualities being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.<sup>5</sup> And a statement in a mercantile contract descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is said to be ordinarily regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.<sup>6</sup>

*Other views.* But some of the cases either avoid the use of the terms "warranty" and "condition" in this connection,<sup>7</sup> or else regard it as immaterial whether the action brought for variance from the description shall be technically considered an action on a warranty, or an action for the non-performance of a contract.<sup>8</sup>

1 *Hogins v. Plympton*, 11 Pick. 97, 99.

2 See *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438, 444; referring to *Chanter v. Hopkins*, 4 Mees. & W. 404; and to *Bannerman v. White*, 10 Com. B. N. S. 844. Consult, also, *Pope v. Allis*, 115 U. S. 363, 371, 372.

3 See *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280, 281; citing, *Bennett's Benjamin on Sales*, § 600, and cases cited in notes; *Pollock on Contracts*, 465; *Story on Contracts*, 1079, and cases cited; 2 *Sutherland on Damages*, 411, and cases cited in note 1.

4 Pope v. Allis, 115 U. S. 363, 371. And see Maxwell v. Lee, 27 N. W. Rep. (Minn.) 196; 21 The Reporter, 727.

5 Pope v. Allis, 115 U. S. 363, 372; citing Chanter v. Hopkins, 4 Mees. & W. 399, 404; Barr v. Gibson, 3 Mees. & W. 390; Gompertz v. Bartlett, 2 El. & B. 849; Okell v. Smith, 1 Stark. 83; notes to Cutter v. Powell, 2 Smith's Lead. Cas. (7th Am. ed.) 37; Woodle v. Whitney, 23 Wis. 25; Boothby v. Scales, 27 Wis. 626; Fairfield v. Madison Manuf. Co. 33 Wis. 346; and referring, also, to Nichol v. Godts, 10 Ex. 91.

6 See Norrington v. Wright, 115 U. S. 188, 203; Filley v. Pope, 115 U. S. 213, 219; Pope v. Allis, 115 U. S. 363, 372.

7 See Bannerman v. White, 10 Com. B. N. S. 844.

8 Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438, 442.

§ 343. Remedies as affecting construction. — *Right of repudiation.* The right to repudiate the purchase for non-conformity of the article delivered to the description under which it was sold is universally conceded.<sup>1</sup>

*Rescission becoming impossible.* And it is said that while the rights of parties who buy under an express or implied warranty as to the quality of the thing sold, and of those persons who contract for one thing while another is delivered to them, may differ in some respects in reference to remedy, yet it would seem that the relief would be the same whether the action be on a warranty or for breach of contract, when rescission has become impracticable, as when the thing delivered has been consumed in testing it.<sup>2</sup> Accordingly it has been laid down that it will comport with sound legal principles to treat engagements of the seller, that the article delivered shall correspond with the description, as conditions, in order to afford the seller a more enlarged remedy by rescission than he would have on a simple warranty, but when his situation has been changed and the remedy by repudiation has become impossible, to give him such redress upon his contract as is alone practicable under the circumstances, by means of an action for damages.<sup>3</sup>

*Representations changing from conditions to warranties.* And it has been held in a number of instances

that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a failure to accept or a return of the article, if that be practicable;<sup>4</sup> but that if part of the consideration has been received, and rescission therefore has become impracticable, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages.<sup>5</sup>

1 Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438, 442.

2 Jones v. George, 61 Tex. 345; 48 Am. Rep. 280, 282.

3 Wolcott v. Mount, 36 N. J. L. 262, 266; 13 Am. Rep. 438, 442; quoted, Jones v. George, 61 Tex. 345; 48 Am. Rep. 280, 282.

4 See Behn v. Burness, 3 Best & Smith, 755; Langdell's Cases on Contracts (1st ed.), 550, 553.

5 Wolcott v. Mount, 36 N. J. L. 262; 13 Am. Rep. 438, 441; relying upon Behn v. Burness, 3 Best & Smith, 755; Langdell's Cases on Contracts (1st ed.), 550, 553, which refers to *Ellen v. Topp*, 6 Ex. 424-441; Langdell's Cases on Contracts (1st ed.), 542; *Elliott v. Von Glehn*, 10 Com. B. N. S. 844; *Graves v. Legg*, 9 Ex. 709-716; Langdell's Cases on Contracts (1st ed.), 555, adopting the observations of Sargeant Williams on the case of *Boone v. Eyre*, 1 Black. II. 273, n. a, in 1 Saund. (6th ed.) §20 d.

§ 344. *Liability of manufacturer.*—*Warranty of merchantability or fitness.* The contract which arises from the description of an article on a sale by a dealer who is not the manufacturer, is not in all respects co-extensive with that which is sometimes implied where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection.<sup>1</sup> In the latter case, a warranty under some circumstances is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered.<sup>2</sup>

*Ordinary sales by description.* But in general, the only contract which arises on the sale of an article by a description, is that it is of the kind specified;<sup>3</sup> and if the article corresponds with that description, no warranty

is implied that it shall answer the particular purpose in view of which the purchase was made.<sup>4</sup>

1 Wolcott v. Mount, 32 N. J. L. 262 ; 13 Am. Rep. 442.

2 Wolcott v. Mount, 32 N. J. L. 262 ; 13 Am. Rep. 442.

3 See Winsor v. Lombard, 18 Pick. 57 ; Bagley v. Cleveland Rolling Mill Co. 21 Fed. Rep. 159, 162.

4 Wolcott v. Mount, 32 N. J. L. 262 ; 13 Am. Rep. 433, 443 ; citing Chanter v. Hopkins, 4 Mees. & W. 411 ; Ollivant v. Bayley, 5 Q. B. 288 ; Winsor v. Lombard, 18 Pick. 55 ; Mixer v. Coburn, 11 Met. 559 ; 45 Am. Dec. 230 ; Gossler v. Eagle etc. Co. 103 Mass. 331 ; and referring to a classification of the cases on this subject, in Jones v. Just, Law R. 3 Q. B. 197.

§ 345. Words of description. — *May amount to a warranty.* Words of description may amount to a warranty if it appears that they were so intended by the parties.<sup>1</sup>

*Oral and written statements.* Nor can any distinction be made between statements of this character in written and in oral contracts, in favor of the view that where the contract is oral, loose expressions of judgment or opinion pending the negotiation might be regarded as embodied in the contract, contrary to the intentions of the parties.<sup>2</sup>

*Question of construction.* But it is always a question of construction<sup>3</sup> or of fact<sup>4</sup> whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract when concluded.<sup>5</sup>

*Disinclination to construe as warranty.* And it is said that courts are usually disinclined, in doubtful cases, to construe words of description as amounting to a warranty.<sup>6</sup>

1 Maxwell v. Lee, 27 N. W. Rep. (Minn.) 196 ; 21 The Reporter, 727 ; referring to Hastings v. Lovering, 2 Pick. 215 ; 13 Am. Dec. 420 ; Hogins v. Plympton, 11 Pick. 97.

2 Wolcott v. Mount, 32 N. J. 262 ; 13 Am. Law Rep. 438, 443.

3 See Behn v. Bumess, 3 Best & Smith, 751 ; Langdell's Cases on Contracts (1st ed.), 580.

4 See citations in next note.

5 *Wolcott v. Mount*, 32 N. J. 262; 13 Am. Rep. 438, 443. If the contract be in writing, the question is one of construction for the court: See *Behn v. Bumess*, 3 Best & Smith, 751. But if it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller: See *Lomi v. Tucker*, 4 Car. & P. 15; *De Sewhanberg v. Buchanan*, 5 Car. & P. 343; *Power v. Barham*, 4 Ad. & E. 473.

6 *Maxwell v. Lee*, 27 N. W. Rep. (Minn.) 196; 21 The Reporter, 727. "Connecticut tobacco" construed as part of the agreement of sale, whether strictly a warranty or not: *Bach v. Levy*, 5 N. E. Rep. (N. Y.) 345. Word "choice": See *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30, 35.

## CHAPTER XXVII.

### WARRANTY OF FITNESS, ETC.

§ 346. Fitness for particular purpose.

§ 347. Merchantable character.

§ 348. Warranty on sale of provisions.

§ 346. **Fitness for particular purpose.**— *General doctrine.* In England, it has been laid down as a general principle that where a man sells an article for a particular purpose, he thereby warrants it fit for that purpose.<sup>1</sup> And where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, made known to the seller at the time of the contract, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, and does not purchase on his own judgment, the rule appears to be that in such case there is an implied term of warranty that the article shall be fit for the purpose to which it is to be applied.<sup>2</sup> So in this country there are various statements of the law tending to a similar result among the different expressions of the scope of the warranty in the leading cases on this subject.<sup>3</sup>

*Illustrative cases.* And it has been held that a sale of leather by the manufacturer thereof to a manufacturer of shoes, for the specific purpose of being manufactured into shoes, carries an implied warranty that the leather sold should be reasonably fit for the purpose for which it was bought, and thus should be sound and suited for shoes.<sup>4</sup> So it has been held that there is a warranty of quality created by the contract of sale, where a dealer offered to purchase a quantity of iron for use by a corporation, which was to buy it of the dealer, and re-



quired it to be of a certain quality known as "strictly neutral," and the sellers, who were also manufacturers, knew of the buyer's purpose and the customer's requirements, and accepted, promising "quality of iron to be strictly neutral."<sup>5</sup>

*Knowledge of buyer's intention, etc.* But the distinction is stated to be well settled that when a known, described, and defined thing is ordered, even of a manufacturer, and although it is stated to be required by the purchaser for a particular purpose, yet if the known, defined, and described thing be actually supplied, the purchaser takes upon himself the risk of its effecting its purpose, and there is no implied warranty that it shall answer the particular purpose intended by the buyer.<sup>6</sup> And it has been held that no warranty is implied merely from the fact that when the prospective buyer contracted for the purchase of specific property, then existing in the form of logs, the expectant seller knew that such buyer intended to use the property for the manufacture of lumber.<sup>7</sup>

*Manufactured article.* In California, it is only where an article is manufactured under an order for a particular purpose, that the manufacturer, by the sale, warrants that it is reasonably fit for that purpose;<sup>8</sup> and fire-wood has been held not a manufactured article, the buyer of which can recover under such an implied warranty, for the loss incurred by his efforts to use it for the purpose of burning bricks in a kiln.<sup>9</sup>

1 *Randall v. Newson*, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 243.

2 See *Jones v. Just*, Law R. 3 Q. B. 197; *Brown v. Edgington*, 2 Man. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

3 Consult, generally, *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Bragg v. Morrill*, 49 Vt. 45; 24 Am. Rep. 102, n. 104; *Best v. Flint*, 58 Vt. 513; 56 Am. Rep. 570, 572; *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Rep. 429, 431; *Herring v. Hoppock*, 34 N. Y. 118; 88 Am. Dec. 428, 431; *Getty v. Rountree*, 2 Pinn. 479; 2 Chand. 28; 54 Am. Dec. 138, 141; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737, 744; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; 22 Am. Law Reg. N. S. 225; note to

Hoult v. Baldwin, 8 Pac. Rep. 443; note to Reynolds v. Palmer, 21 Fed. Rep. 443.

4 Dearborn v. Downing, 117 Me. 457; referring to French v. Vin- ing, 102 Mass. 132; Hight v. Bacon, 126 Mass. 11; Pease v. Sabine, 33 Vt. 432; Jones v. Just, Law R. 3 Q. B. 197; Jones v. Bright, 5 Bing. 533.

5 Phila. etc. Coal etc. Co. Hoffman, 4 Atl. Rep. (Pa.) 848.

6 Warren Glass Works Co. v. Keystone Coal Co. 65 Md. 547; 5 Atl. Rep. 253; relying upon Rasin v. Conley, 58 Md. 65; and referring to sanction of rule of *caveat emptor* in Hyatt v. Boyle, 5 Gill. & J. 120; Gunther v. Atwell, 19 Md. 171; Rice v. Forsyth, 41 Md. 404. And see Jones v. Just, Law R. 3 Q. B. 197; citing, Chanter v. Hopkins, 4 Mees. & W. 399; Ollivant v. Bayley, 5 Q. B. 288. Consult note to Reynolds v. Palmer, 21 Fed. Rep. 446. Compare Dounce v. Dow, 64 N. Y. 411; Rodgers v. Niles, 11 Ohio St. 48; Gerst v. Jones, 32 Gratt. 521; Deming v. Foster, 42 N. H. 165; Lukens v. Freilund, 27 Kan. 664; 41 Am. Rep. 429, 430, 431.

7 Thompson v. Libby, 29 N. W. Rep. (Minn.) 150; referring to Cosgrove v. Bennett, 32 Minn. 371; 20 N. W. Rep. 359, Whitmore v. South Boston Iron Co. 2 Allen, 52, 53; Hight v. Bacon, 126 Mass. 10; Port Carbon Iron Co. v. Groves, 68 Pa. St. 149; Mason v. Chappell, 15 Gratt. 572, 584; Rasin v. Conley, 58 Md. 59; Gachet v. Warren, 72 Ala. 288; Jones v. Just, Law R. 3 Q. B. 197, 202.

8 See Carreio v. Lynch, 65 Cal. 273; Hoult v. Baldwin, 8 Pac. Rep. 440, 442.

9 Carreio v. Lynch, 65 Cal. 273.

§ 347. **Merchantable character.**—*Connection with other warranties.* The implied warranty of merchantable character<sup>1</sup> is generally connected with that on sales by description, or of fitness for special purpose.<sup>2</sup> Thus it is said that under a contract to supply goods of a speci- fied description, which the buyer has had no oppor- tunity of inspecting, the goods must not only in fact correspond to the specific description, but must be salable or merchantable under that description.<sup>3</sup> So it is laid down that a contract to manufacture and deliver an article at a future day, carries with it an obligation that the article shall be merchantable,<sup>4</sup> or if sold for a par- ticular purpose, that it shall be suitable and proper for such purpose.<sup>5</sup>

*Limitations of scope.* But it has been held that in the case of logs so situated that they could not be inspected by the vendee at the time of an executory contract for their sale, any undertaking which may be implied on

the part of the vendor as to their merchantable quality, is to be treated as a condition rather than as a warranty as to obvious defects, discoverable on delivery.<sup>6</sup> And some of the decisions refer to a warranty of merchantable quality as concerning executory contracts only,<sup>7</sup> or attempt to distinguish such a warranty as indicating that the article shall be marketable anywhere as a sound article of merchandise, from a mere warranty that it was merchantable and fit for the use for which it was bought.<sup>8</sup>

1 See generally, *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305, 307, n. 312; *Kohl v. Lindley*, 39 Ill. 195; 89 Am. Dec. 294, 300, 301; *Ryman v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210, 211; *Rodgers v. Niles*, 11 Ohio St. 48.

2 See succeeding portions of section. And consult note to *Reynolds v. Palmer*, 21 Fed. Rep. 441.

3 *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547; 5 Atl. Rep. 253. And see *Gardiner v. Gray*, 4 Camp. 144; *Bennett's Benjamin on Sales*, § 656, and cases cited and reviewed.

4 "Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article:" *Jones v. Just*, Law R. 3 Q. B. 197; citing, *Laing v. Fidgem*, 4 Camp. 169; 6 Taunt. 108. Impracticability of examination, etc.: *Rodgers v. Niles*, 11 Ohio St. 48.

5 *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515, 518; *Bennett's Benjamin on Sales*, § 657, n. 1; citing, also, *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *Brown v. Sayles*, 27 Vt. 227; *Walton v. Cody*, 1 Wis. 420; *Leopold v. Van Kirk*, 27 Wis. 152. See, also, *Jones v. Bright*, 5 Bing. 544; note to *Reynolds v. Palmer*, 21 Fed. Rep. 441; *Randall v. Newson*, Law R. 2 Q. B. 102; 19 Eng. Rep. 243.

6 *Thompson v. Libby*, 29 N. W. Rep. (Minn.) 150.

7 See *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305, 307, n. 312.

8 *Kohl v. Lindley*, 39 Ill. 195; 89 Am. Dec. 294, 301. Continuance of warranty: See *Bull v. Robinson*, 10 Ex. 341; *Leggatt v. Sands Ale etc. Co.* 60 Ill. 158; *Mann v. Everston*, 32 Ind. 355; does not extend to receptacle: *Gower v. Van Dedalzen*, 3 Bing. N. C. 717; 2 Schouler on Personal Property, § 355.

§ 348. **Warranty on sale of provisions.**—*English view.* In England, apart from special statutory enactments concerning dealers in victuals, and notwithstanding declarations of a contrary tendency, there does not seem to be any implied warranty on sales of food, that it shall be sound or wholesome or fit for food.<sup>1</sup>

*American view.* But in the United States,<sup>2</sup> it seems to be generally considered that there is an implied warranty that provisions directly sold for immediate domestic consumption are sound and wholesome;<sup>3</sup> but that there is no such warranty, if any exists at all, upon a sale of provisions to dealers as merchandise.<sup>4</sup>

1 See *Burnby v. Bollett*, 16 Mees. & W. 644; 2 *Corbin's Benjamin on Sales*, p. 875; *Wharton on Contracts*, p. 329; *Biddle on Chattel Warranties*, §§ 187-191; 2 *Schouler on Personal Property*, § 348; note to *Reynolds v. Palmer*, 21 Fed. Rep. 449. And consult *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676; *Emmertson v. Matthews*, 7 Hurl. & N. 536; *Smith v. Baker*, 40 L. T. N. S. 261. Compare *Bigge v. Parkinson*, 7 Hurl. & N. 955; *Beer v. Walker*, 25 Week. R. 885; note to *Hunter v. State*, 73 Am. Dec. 167, 168.

2 See *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Dec. 429, 432, note to *Hunter v. State*, 73 Am. Dec. 165, 167, discussing this subject at length; note to *Reynolds v. Palmer*, 21 Fed. Rep. 450.

3 See *Hoover v. Peters*, 18 Mich. 51; *McNaughton v. Joy*, 1 Week. Notes Cas. 470; *Morehouse v. Comstock*, 42 Wis. 636; *Story on Sales*, § 373; note to *Hunter v. State*, 73 Am. Dec. 167; note to *Reynolds v. Palmer*, 21 Fed. Rep. 453. And consult *Van Bracklin v. Fonda*, 12 Johns. 268; 7 Am. Dec. 339; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676; *Ryder v. Neitge*, 21 Minn. 70; *Hyland v. Sherman*, 2 Smith, E. D. 234; *Burch v. Spencer*, 15 Hun, 504. But compare *Biddle on Chattel Warranties*, § 204; 2 *Schouler on Personal Property*, § 348; *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Rep. 429, 432; *Humphreys v. Comline*, 8 Blackf. 516.

4 See *Winsor v. Lombard*, 18 Pick. 61; *Humphreys v. Comline*, 8 Blackf. 516; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Lukens v. Freilund*, 27 Kan. 664; 41 Am. Rep. 429, 432. And consult generally, *Emerson v. Brigham*, 10 Mass. 197; 6 Am. Dec. 109; *Moses v. Mead*, 1 Denio, 387; 43 Am. Dec. 676.

## CHAPTER XXVIII.

## LATENT DEFECTS.

§ 349. Latent defects in general.

§ 350. Seller's knowledge or fault lacking.

§ 349. *Latent defects in general. — Sample sale by dealer.* It has been laid down that the law applicable to latent defects in goods on sales by sample, in a case where the seller was not a manufacturer, which cannot be varied by a usage treating such goods as damaged goods, is that if there is a defect in the bulk, and in the sample itself as a part thereof, and this defect is unknown and cannot be discovered by examination, there is no implied warranty against this defect rendering the seller responsible therefor.<sup>1</sup>

*Manufacturer's sale.* But the rule where one sells an article of his own manufacture is said to be, that the vendor in such a case is liable for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured, and also if he knowingly uses improper materials;<sup>2</sup> but that he is not liable for any latent defect in the material which he is not shown, and cannot be presumed to have known.<sup>3</sup>

*Grower's liability.* And the same rule, based on the presumed superior knowledge of the vendor, has been considered applicable so as to imply a warranty, on a sale of seeds by the grower, that they are not defective from improper cultivation.<sup>4</sup>

*Executory and executed contracts.* But upon the ground of a distinction between an executory contract and an executed sale of specific goods, that part of the rule which exempts the seller from liability for latent defects in the material which he is not shown, and can-

not be presumed to have known,<sup>5</sup> has been deemed inapplicable where parties contracted to manufacture for future delivery, three steam-boilers to run engines in a rolling-mill, and for which a specified price was agreed to be paid;<sup>6</sup> and it was laid down that under such circumstances the contracting parties must be regarded as having agreed to procure such materials, and apply such workmanship as would furnish to the others steam-boilers free from all such defects, latent or otherwise, as would render them unfit for the ordinary uses contemplated by the contract.<sup>7</sup>

*Warranty of reasonable fitness.* In England, the doctrine seems to be maintained that there is no exception as to latent undiscoverable defects, to the rule that on a sale of an article purchased for a specific purpose, there is a warranty by the vendor that it is reasonably fit for that purpose.<sup>8</sup>

*Existing specific article.* Where an existing, specific, definite thing is sold, without fraudulent conduct or an express warranty of quality, the rule of *caveat emptor* governs as to latent defects.<sup>9</sup>

*Statutory regulation.* In California, it is enacted that one who sells, or agrees to sell, an article of his own manufacture, thereby warrants, if free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.<sup>10</sup>

1 Dickinson v. Gay, 7 Allen, 29; 83 Am. Dec. 656, 658. Compare Heilbutt v. Hickson, Law R. 7 Com. P. 458; 3 Eng. Rep. 328; Barnard v. Kellogg, 10 Wall. 383.

2 Hoe v. Sanborn, 21 N. Y. 552; 78 Am. Dec. 163, 175. And consult Randall v. Newson, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 243. But compare Cunningham v. Hall, 4 Allen, 268, 274.

3 Hoe v. Sanborn, 21 N. Y. 552; 78 Am. Dec. 163, 175. And consult Bragg v. Morrill, 49 Vt. 45; 24 Am. Rep. 102, 103, 104. But see Rodgers v. Niles, 11 Ohio St. 48, 56, 57. Implication of ordinary quality of article manufactured to order: Brown v. Sayles, 27 Vt. 227, 230, 231.

4 *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13, 17; S. C. 78 N. Y. 393; 34 Am. Rep. 544.

5 See *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163, 175.

6 *Rodgers v. Niles*, 11 Ohio St. 48, 57.

7 *Rodgers v. Niles*, 11 Ohio St. 48, 56.

8 *Randall v. Newson*, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 243; distinguishing, *Redhead v. Midland Ry. Co.* Law R. 4 Q. B. 243.

9 See *Parkinson v. Lee*, 2 East, 314; *Kingsbury v. Taylor*, 29 Me. 503; 50 Am. Dec. 607; *Hadley v. Clinton etc. Co.* 13 Ohio St. 502; 82 Am. Dec. 454; *Frazier v. Harvey*, 34 Conn. 469; *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504; *Hoe v. Sanborn*, 21 N. Y. 552; 78 Am. Dec. 163; 2 *Schouler on Personal Property*, § 365, so citing these cases.

10 See *Hoult v. Baldwin*, 8 Pac. Rep. (Cal.) 440, 442; Cal. Civ. Code, § 1769.

§ 350. *Seller's knowledge or fault lacking.*—*Question in England.* In England, the question has been raised whether the law lays upon the seller or manufacturer, an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended,<sup>1</sup> and renders him responsible for all the consequences which may result if it shall be found not to answer the purpose for which it was designed, in consequence of some latent defect of which he was ignorant, and which is not proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him.<sup>2</sup>

*Breaking of carriage pole.* And where a carriage builder supplied a pole for a carriage which broke when the buyer was driving, so that his horses were injured, it was held that the carriage builder must be taken to have warranted the pole to be reasonably fit for the particular purpose, and that it was immaterial that the fracture was caused by a latent defect in the wood which he could not have discovered by the exercise of any reasonable care or skill.<sup>3</sup>

*American view.* But in this country the result of the cases on implied warranty has been considered

to be, that the vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced through the unskillfulness of some previous manufacturer or owner without his knowledge or fault,<sup>4</sup> except in those cases where the sale of the article by him is in and of itself legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects.<sup>5</sup>

1 Warranty of fitness: See § 346.

2 See argument in *Randall v. Newson*, Law R. 2 Q. B. D. 102; 19 Eng. Rep. 243; referring to dictum in *Gray v. Cox*, 4 Barn. & C. 115.

3 *Randall v. Newson*, Law R. 2 Q. B. D. 102, 109; 19 Eng. Rep. 243; relying upon *Gray v. Cox*, 4 Barn. & C. 108, 115, and *Jones v. Bright*, 5 Bing. 533, 540; distinguishing, *Redhead v. Midland Ry. Co.* Law R. 2 Q. B. 412; Law R. 4 Q. B. 379.

4 Compare *Rodgers v. Niles*, 11 Ohio St. 48, 56.

5 *Bragg v. Morrill*, 49 Vt. 45; 24 Am. Rep. 102. Basis of foregoing matter: Bennett's Benjamin on Sales, § 657, n. k, and § 661 a. On defects not discoverable by inspection: Consult, also, 2 Corbin's Benjamin on Sales, § 936, n. 33; Story on Sales, §§ 374, 375. Warranty of fitness and latent defects: See note to *Hoult v. Baldwin*, 8 Pacif. Rep. 443.



## CHAPTER XXIX.

## REMEDIES FOR BREACH OF WARRANTY.

§ 351. In general.

§ 352. Return of goods.

§ 353. Damages.

§ 351. In general.— *Where warranty of quality.* It has been declared to be a general proposition that on a sale of a chattel with a warranty, the purchaser, in case the chattel turns out not to be of the kind or quality represented, may have one of two remedies.<sup>1</sup> One remedy is that he may rescind the contract and return the property, restoring whatever has been paid or delivered by either party, and thereby placing the parties in the same position they occupied before the purchase.<sup>2</sup> The other remedy is that the purchaser may affirm the contract, retain the property, and recover damages from the vendor for a breach.<sup>3</sup> But this statement of the law in regard to the absolute right of rescission, conforms only to the view in some of the States,<sup>4</sup> while in others, such right is subject to various limitations; and in England as well as in various parts of this country, the right to return the goods does not appear to exist at all, in the absence of fraud or special stipulation, in the case of a specific chattel, where the property has passed to the buyer.<sup>5</sup> On the other hand, the buyer may not only accept the goods and bring a cross-action for the breach of the warranty, but he may now in England, as well as in many parts of this country, plead as a set-off, or set up by way of counter-claim, damages for breach of warranty in the action brought by the vendor for the price.<sup>6</sup>

*Where warranty of title.* If the breach be of warranty

of title,<sup>7</sup> the buyer may either bring his action for the return of the price, on the ground of failure of the consideration for which the price was paid,<sup>8</sup> or he may sue in damages for breach of the vendor's promise, as in all other cases of breach of contract.<sup>9</sup>

*Evidence.* Where the failure of an engine, bought to run a threshing-machine to fulfill the terms of the warranty, is relied upon as a defense to a suit upon the price note, evidence of how the owner of an engine and machine of the same make and pattern would thresh in a day with his engine and thresher is not improper.<sup>10</sup>

1 Weybrich v. Harris, 31 Kan. 92; referring to McCormick v. Roberts, 32 Kan. 68. Walver of remedies for breach: 2 Schouler on Personal Property, § 588; Adder v. Robert Partner Brewing Co. 2 Atl. Rep. (Pa.) 918.

2 Weybrich v. Harris, 31 Kan. 92.

3 Weybrich v. Harris, 31 Kan. 92. It is said, however, that these two are the only remedies that the purchaser has under the circumstances, and that he may not set aside an express contract and have the courts create a new and implied one, but must either rest on the contract as made, or rescind and repudiate it: Weybrich v. Harris, 31 Kan. 92.

4 Avoidance of contract in various States: See 2 Corbin's Benjamin on Sales, § 1343, n. 17; citing, Wright v. Davenport, 44 Tex. 164; Churchill v. Price, 44 Wis. 540, 541; Kimball etc. Co. v. Vrooman, 35 Mich. 310, 326; Mendell v. Buttles, 21 Minn. 391, 397; Clarke v. McGatchie, 49 Iowa, 437; Jack v. Des Moines etc. R. R. 53 Iowa, 399, 402; Dike v. Reitlinger, 23 Hun, 241, 243; Lyon v. Bertram, 20 How. 149, 154.

5 See 2 Schouler on Personal Property, § 579; citing, Street v. Blay, 2 Barn. & Adol. 456; Dawson v. Collis, 10 Com. B. 530; Mondell v. Steel, 8 Mees. & W. 858; Heyworth v. Hutchinson, Law R. 2 Q. B. 447. Compare Heilbutt v. Hickson, Law R. 7 Com. P. 438; 3 Eng. Rep. 328; Couston v. Chapman, Law R. 2 H. L. S. 250; 3 Eng. Rep. 187; Grimoldby v. Wells, Law R. 10 Com. P. 391; 12 Eng. Rep. 451. And consult next section on RETURN OF GOODS.

6 See Bennett's Benjamin on Sales, § 894; citing, Coventry v. M'Eniry, 13 Ir. Com. Law Rep. 160; Smith v. Dunham, 2 Kerr, 630; Morrill v. Nightingale, 39 Wis. 247. And consult Biddle on Chattel Warranties, § 303; 2 Schouler on Personal Property, §§ 582-584; Getty v. Rountree, 2 Pinn. 379; 2 Chand. 28; 54 Am. Dec. 138, 143. Compare Carey v. Guillone, 105 Mass. 18; Odum v. Harrison, 1 Jones (N. C.) 402; Gillespie v. Torrance, 25 N. Y. 306; 82 Am. Dec. 355.

7 Breach by dispossession, etc.: § 329.

8 As in Eichholz v. Bannister, 17 Com. B. N. S. 708; 34 Law J. Com. P. 108.

9 Bennett's Benjamin on Sales, § 893. And see Biddle on Chattel Warranties, § 293; 2 Schouler on Personal Property, § 589.

10 Nat. Bank & Loan Co. v. Dunn, 6 N. E. Rep. (Ind.) 131; referring to rule concerning comparison of machinery in McCormick H. M. Co. v. Gray, 100 Ind. 285. Error to reject evidence of trifling cost and trouble of putting new tension in defective machine: Wheeler & Wilson Manuf. Co. v. Thompson, 33 Kan. 491. Evidence of alteration of written warranty when inadmissible: Bowker v. De Long, 4 N. E. Rep. 834. Incompetency, as too remote, of low price paid for molasses claimed to have been sold with warranty: Ockerhauser v. Durant, 5 N. E. Rep. (Mass.) 523. Irrelevant questions as to purchase and rejection of other horses in action on a warranty of a horse: Russell v. Cruttenden, 53 Conn. 564. Wrong general design of machine, and failure of other like machines: Lyon v. Martin, 31 Kan. 411. Evidence against warranty of purity, etc.: Sliatto v. Abernethy, 29 N. W. Rep. (Minn.) 325. Fitness, parol proof concerning: Warren Glass Works Co. v. Keystone Coal Co. 65 Md. 547.

§ 352. *Return of goods.*—*Not necessary to obtaining damages.* The law is well settled that where there is an express or implied warranty in the sale of goods, it is not necessary that the vendee should return, or offer to return them, to enable him to recover or recoup the damages which he has sustained by a breach of the warranty.<sup>1</sup>

*Conflict concerning permissibility of.* But there is a conflict of authority in this country upon the question whether the buyer may return the goods, thus treating the contract as rescinded, and yet recover or recoup his damages for the breach of warranty, thus treating the contract as subsisting.<sup>2</sup>

*View against right to return.* Thus, it seems to be regarded as settled in New York, at least as to executed contracts of sale, and in the case of specific ascertained goods, that the buyer has no right to return goods sold with warranty of quality, unless there was fraud in the sale, or an express contract conferring such right;<sup>3</sup> and similar views receive support in other States.<sup>4</sup>

*View favoring right to return.* But the rule in many of the United States, including Massachusetts,<sup>5</sup> Maine,<sup>6</sup> Maryland,<sup>7</sup> Iowa,<sup>8</sup> and other States,<sup>9</sup> is that to avoid circuity of action, a warranty may be treated as a condition subsequent at the election of the buyer, who is accordingly entitled, upon the seller's breach of such

warranty, to rescind the contract and return the goods.<sup>10</sup>

1 Best *v. Flint*, 58 Vt. 543; 56 Am. Rep. 570. And in an action for the purchase price of the goods, the buyer may show the breach of warranty in diminution of the price or reduction of damages: Best *v. Flint*, 58 Vt. 543; 5 Atl. Rep. 192; referring to Cutter *v. Powell*, 2 Smith's Lead. Cas. 25, 26; Waring *v. Mason*, 18 Wend. 425; West *v. Cutting*, 19 Vt. 526. Consult, also, Getty *v. Rountree*, 2 Pinn. 279; 2 Chand. 28; 54 Am. Dec. 133, 144.

2 See succeeding portions of section. And consult Brantley *v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264, 267. Compare Johnson *v. McLane*, 7 Black. 501; 43 Am. Dec. 102, n. 106.

3 See Day *v. Pool*, 52 N. Y. 416; 11 Am. Rep. 719; Parks *v. Morris* etc. Co. 54 N. Y. 586; Messmore *v. N. Y. Shot* etc. Co. 40 N. Y. 422; Russ *v. Eckler*, 41 N. Y. 483; Lawton *v. Keil*, 61 Barb. 558. Warranty on executory sales survives acceptance: See Briggs *v. Hilton*, 99 N. Y. 517; 52 Am. Rep. 63; Kent *v. Friedman*, 3 N. E. Rep. 905.

4 See Freyman *v. Knecht*, 78 Pa. St. 141; Bunce *v. Beck*, 43 Mo. 279. And consult Story on Sales, § 455; 2 Schouler on Personal Property, § 579, whence paragraph mainly derived; Lyon *v. Bertram*, 20 How. 149.

5 See Dorr *v. Fisher*, 1 Cush. 271; Bryant *v. Isburgh*, 13 Gray, 637; Morse *v. Brackett*, 98 Mass. 209.

6 See Marston *v. Knight*, 29 Me. 341; Marshall *v. Perry*, 67 Me. 78.

7 See Hyatt *v. Boyle*, 5 Gill & J. 121.

8 See Rogers *v. Hanson*, 35 Iowa, 283; Jack *v. Des Moines R. R.* 53 Iowa, 399.

9 See citations in next note.

10 2 Schouler on Personal Property, § 578, whence paragraph derived; citing, also, Gates *v. Bliss*, 43 Vt. 299; Butter *v. Northumberland*, 50 N. H. 33; Osborn *v. Gantz*, 60 N. Y. 540; Youghiogheny Iron Co. *v. Smith*, 66 Pa. St. 340; Dill *v. Ferrell*, 45 Ind. 268; Marsh *v. Low*, 55 Ind. 271; Ralph *v. Chicago* etc. Co. 32 Wis. 177. Prompt notice of return required: See Paulson *v. Osborn*, 27 N. W. Rep. (Minn.) 203; 21 The Reporter, 783; citing, on need of notice, Smalley *v. Hendrickson*, 29 N. J. L. 371; Dewey *v. Erie Borough*, 14 Pa. St. 211; Moral School Township *v. Harrison*, 74 Ind. 93. Consult further, on effect and limit of right to reject, 2 Schouler on Personal Property, § 580.

§ 353. **Damages.**—*In general.* Generally speaking, when personal property is sold, and it is not of the kind represented and warranted, the measure of damages is the difference between the contract price and the value of the article delivered.<sup>1</sup>

*Enhancement of damages.* Yet the measure of damages may sometimes be enhanced by proof that the property was purchased for a specific purpose, and that

the sale was made by the vendor with the knowledge that the property was intended for such specific purpose.<sup>2</sup>

*No knowledge of special purpose.* But if the vendor knows nothing of the contract made by the vendee, or the specific purpose for which the property is intended, and knows simply that the purchaser is seeking for an article of the kind and quality named, his liability is limited to the difference between the value of the article already delivered, and that of the article which the parties intended to purchase and contracted for.<sup>3</sup>

*Place of computation, etc.* Where goods are to be used in a distant place, and the parties so understood, damages for breach of warranty may be ascertained there.<sup>4</sup>

1 Weybrich v. Harris, 31 Kan. 92; Wheeler & Wilson Manuf. Co. v. Thompson, 33 Kan. 491. And see Sedgwick on Damages (5th ed.), 318; Story on Sales, §§ 449, 454, 455; 2 Schouler on Personal Property, § 535; citing, also, Jones v. Just, Law R. 3 Q. B. 197; Moulton v. Scruton, 9 Me. 287; Whitmore v. South Boston Iron Co. 2 Allen, 52; Merrimack Manuf. Co. v. Quintard, 139 Mass. 127; Muller v. Eno, 14 N. Y. 597; Howie v. Rea, 70 N. C. 559.

2 Weybrich v. Harris, 31 Kan. 92. Expenses, interest, etc.: See Murry v. Meredith, 25 Ark. 134; Furlong v. Polleys, 20 Me. 491; Moulton v. Scruton, 30 Me. 287; 2 Sedgwick on Damages (7th ed.), 185.

3 Weybrich v. Harris, 31 Kan. 92. And see Wheeler & Wilson Manuf. Co. v. Thompson, 33 Kan. 491.

4 Phila. etc. Coal Co. v. Hoffman, 4 Atl. Rep. (Pa.) 848. Consult further on full value, agreed price, natural consequences, sale to sub-buyer, delivery by instalments, etc.; 2 Schouler on Personal Property, §§ 585-587.

## CHAPTER XXX.

### FRAUDULENT SALES.

- § 354. Fraud in general.
- § 355. Fraud on buyer and *caveat emptor*.
- § 356. Reliance upon seller's representations.
- § 357. What constitutes seller's fraud.
- § 358. Buyer's remedies for fraud.
- § 359. Fraud on seller.
- § 360. Buyer's fraudulent devices.
- § 361. Fraud upon creditors.

§ 354. **Fraud in general.** — *Distinguished from mistake.* Fraud, as a ground of avoidance of the contract of sale, differs from mistake in relying upon misconduct of the opposite party, rather than upon one's own innocent error, as a motive for setting aside the transaction.<sup>1</sup>

*Phases of fraud.* Among the leading causes which justify the interference of the courts for fraud are misrepresentation,<sup>2</sup> wrongful concealment,<sup>3</sup> the abuse of confidence,<sup>4</sup> and employment of force;<sup>5</sup> and it is said that the modes of fraud are infinite, so that courts are indisposed to lay down any definition<sup>6</sup> of the word.<sup>7</sup>

*Effect, remedies, etc.* Fraud is good ground for the non-enforcement or avoidance of a contract at the instance of the innocent party who is thereby injured,<sup>8</sup> as it prevents real assent and renders the contract voidable *ab initio*;<sup>9</sup> and the fraud to be remedied in a sale may be that of the seller on the buyer, or that of the buyer on the seller, or that of both buyer and seller upon some third party.<sup>10</sup>

*Voidable and void transactions.* Fraud goes to the motives for making the contract, not to its execution, and only becomes important as such when a sale or contract is complete in its formal elements, and there-

fore valid until repudiated, though the right is claimed to rescind it.<sup>11</sup> But when one of the formal constituents of illegal transactions is wanting, as the identity of the supposed party dealt with, it is said that there is no question of rescission, but that the contract is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistake.<sup>12</sup>

*Failure to disclose defects.* A failure on the part of the vendor to disclose unsoundness or faults, has been ruled<sup>13</sup> not to be fraud at law.<sup>14</sup>

*Fraud of agent.* And a principal is an innocent vendor where he neither authorized any representations to be made, nor artifice to be used by his agents in effecting the sale of a mare which he knew to be lame and balky.<sup>15</sup>

1 2 Schouler on Personal Property, § 602. And compare Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 439. The one party must do wrong intentionally, and the other act because of such fraud: 2 Schouler on Personal Property, § 602. Discussion of various phases of subject: 1 Abbott's Law Dict. 520; 1 Bouvier Law Dict. (15th ed.) 638.

2 See Bigelow on Fraud, 4-9.

3 See Kohl v. Lindley, 39 Ill. 195; 89 Am. Dec. 294, 298, 299. Compare Decker v. Fredericks, 47 N. J. L. 469, 472.

4 Bigelow on Fraud, 10. Reliance on confidential relations in sale of oyster-bed: Hemingway v. Coleman, 49 Conn. 390; 44 Am. Rep. 243.

5 2 Schouler on Personal Property, § 602, on which paragraph mainly based.

6 See collection of definitions in Winfield's Words etc. 274.

7 See Story's Eq. Juris. § 186; 2 Parsons on Contracts (5th ed.), 769; 1 Corbin's Benjamin on Sales, § 636; Story on Sales, § 158, et seq. Action for deceit by defrauded party: See Clarke v. Dickson, El. B. & E. 148; Queen v. Saddlers Co. 10 H. L. Cas. 621.

8 2 Schouler on Personal Property, § 602

9 See 1 Corbin's Benjamin on Sales, § 636; citing, Bank of Georgia v. Higginbottom, 9 Peters, 48; Duncan v. McCullough, 4 Serg. & R. 483. Compare Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 805. Requisites of representations for such effect: See Gregory v. Schoenell, 55 Ind. 101, 106. Evidence in action of tort for false and fraudulent representations in sale: Bowker v. De Long, 4 N. E. Rep. (Ind.) 834, with note, 835. Requisites of recovery for representations of solvency of bank; knowledge, etc.: Cole v. Cassidy, 138 Mass. 437; 52 Am. Rep. 284. Fraudulent purpose to deceive: Cowley v. Smith, 46 N. J. L. 380; 50 Am. Rep. 432.

10 2 Schouler on Personal Property, § 602. Indictment for obtaining money by false pretenses; sufficiency of proof: Commonwealth v. Blood, 6 N. E. Rep. (Mass.) 763. Evidence of similar pretenses in other recent independent sales: Commonwealth v. Jackson, 132 Mass. 16.

11 Rodliff v. Dallinger, 141 Mass. 1; 55 Am. Rep. 439. Rescission and return of goods: See Vogel v. Demarest, 97 Ind. 440. Divisible sale by sample: Meyer v. Wheeler, 19 The Reporter (Iowa), 302.

12 Rodliff v. Dallinger, 141 Mass. 1; 4 N. E. Rep. 805.

13 According to Decker v. Fredericks, 47 N. J. L. 469, 472.

14 See Beninger v. Corwin, 4 Zab. 257.

15 Decker v. Fredericks, 47 N. J. L. 469, 472; referring to doctrine of Kennedy v. McKay, 14 Vroom, 288.

§ 355. **Fraud on buyer and caveat emptor.**—*Failure to disclose qualities of thing sold.* A purchaser may avoid the contract of sale for false and fraudulent representations of the seller.<sup>1</sup> But it is a general proposition of the law upon this subject that fraud cannot be imputed to one who fails to inform the person with whom he is dealing of that which he was under no obligation to impart to him,<sup>2</sup> but that the rule of *caveat emptor*, which governs in such cases, puts upon a purchasing party the necessity of informing himself concerning the qualities of any specific chattel, or incorporeal security which constitutes the subject-matter of the sale, and of drawing no inference from outside appearances, from the price demanded for the thing, or from the seller's failure to point out defects, but of exercising his own judgment so far as possible, and asking for a warranty if he desires further assurance.<sup>3</sup>

*When fraud not made out.* Hence, the buyer cannot allege fraud where he inspects what he purchases, and the defect is apparent;<sup>4</sup> nor where a defect was not known to be such by the seller, from appearances, and no concealment in order to deceive was practiced;<sup>5</sup> nor, of course, where the buyer takes the thing with all faults;<sup>6</sup> nor where it appears that instead of trusting to the seller's statements on the point, the buyer veri-



fied by his own experts, or consummated the bargain upon the report of his own agents;<sup>7</sup> nor where he makes his own fair examination as to the point, and relies upon his judgment;<sup>8</sup> nor, in general, where the matter was open to the buyer's observation, so that, by exercising ordinary diligence and prudence, he could have ascertained the defect.<sup>9</sup>

*Seller's silence.* So, in general, the seller's silence, even though amounting to a passive acquiescence in the buyer's self-deception as to the quality or intrinsic value of the subject-matter bargained for, does not avoid the contract for fraud, but comes within the protection of *caveat emptor*.<sup>10</sup>

*Seller's active conduct.* But where the seller is guilty of wilful misrepresentation as to material points, and thereby induces a party to purchase on terms that would otherwise have been withheld, or where there is wrongful concealment, exercise of force, or fraudulent conduct generally, *caveat emptor* does not apply, and the sale is so far vitiated that the deceived party may disaffirm it.<sup>11</sup>

1 Taylor v. Mississippi Mills, 1 Southw. Rep. (Ark.) 283; citing, Plant v. Condit, 22 Ark. 454; Morton v. Scull, 23 Ark. 239; Right v. Roller, 31 Ark. 170.

2 See citations in next note.

3 2 Schouler on Personal Property, § 603; citing, Bennett's Benjamin on Sales, § 430; Smith v. Hughes, Law R. 6 Q. B. 597; Jackson v. Wetherel, 7 Serg. & R. 422; Gossler v. Eagle Sugar Refinery, 103 Mass. 331; Renton v. Maryott, 21 N. J. Eq. 113. Failure to disclose latent defect: Hadley v. Clinton etc. Co. 13 Ohio St. 502; 82 Am. Dec. 454. And see Cecil v. Spurger, 32 Mo. 462; 82 Am. Dec. 140.

4 Morse v. Rathburn, 49 Mo. 91.

5 Cogel v. Knisely, 89 Ill. 538; 85 Ill. 16.

6 Pearce v. Blackwell, 12 Ired. 49.

7 Howell v. Biddlecorn, 62 Barb. 131.

8 Pattison v. Jenkins, 33 Ind. 87; Stephens v. Orman, 10 Fla. 9.

9 Brown v. Leach, 107 Mass. 364; Rocchi v. Schwahacher, 33 La. An. 1364. And compare Poland v. Brownell, 131 Mass. 38. Source of paragraph: 2 Schouler on Personal Property, § 603.

10 Smith v. Hughes, Law R. 6 Q. B. 579, as cited in support of text in 2 Schouler on Personal Property, § 603.

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11 2 Schouler on Personal Property, ‡ 604; citing, Story on Sales, §§ 378-380; Bennett's Benjamin on Sales, ‡ 430; Regina v. Kenrick, 5 Q. B. 49; Paddock v. Strobridge, 29 Vt. 470; Manning v. Albee, 11 Allen, 522. Fraud on buyer in general: inadequate price (Wood v. Boynton, 64 Wis. 265; 54 Am. Rep. 610); procuring signature to order (Gross v. Dryer, 28 N. W. Rep. (Wis.) 141); by-bidding and puffers at auction sales (Miller v. Baynard, 83 Am. Dec. 168; Peck v. List, 23 W. Va. 338; 48 Am. Rep. 398); false representations (Morehouse v. Northrop, 89 Am. Dec. 211); burden of proof in action for false representations: Faville v. Shehan, 26 N. W. Rep. (Mich.) 131, n.

‡ 356. **Reliance upon seller's representation.**—*In general.* In order to avoid the sale on the ground of the seller's false representations, the party purchasing must have been deceived by the representation, and, in general, it must appear that the buyer trusted to the inducement which proves fraudulent, and bought on the strength of it.<sup>1</sup>

*Determining circumstances.* And among important circumstances in determining the issue as to whether the buyer relied upon the seller's alleged false representations, are the buyer's opportunity to be present and examine the thing for himself before concluding the sale;<sup>2</sup> the character of the thing, as in the case of a patent machine bought of an expert by a purchaser not skilled in mechanical matters, where the qualities of the article may be well known to the seller, but must be taken by the buyer in trust;<sup>3</sup> or the resort by the seller to some trick or artifice for the purpose of checking examination, or diverting the buyer from the line of inquiry which he would otherwise most likely have pursued.<sup>4</sup>

1 See Smith v. Hughes, Law R. 6 Q. B. 597; Bennett's Benjamin on Sales, ‡ 429; Morse v. Rathburn, 49 Mo. 91; 2 Schouler on Personal Property, ‡ 605, whence paragraph derived. But the buyer's right to rely upon the seller's false statements is favored: Redgrave v. Hurd, Law R. 20 Ch. D. 1; Collins v. Dennison, 12 Met. 549.

2 Vandewalker v. Osmer, 65 Barb. 556; Smith v. Richards, 13 Peters, 26; Bendurant v. Crawford, 22 Iowa, 40.

3 See Page v. Dickerson, 28 Wis. 694; Kendall v. Wilson, 41 Vt. 567.

4 See Story on Sales, ‡ 381; Smith v. Hughes, Law R. 6 Q. B. 597; Roseman v. Canovan, 43 Cal. 110; 2 Schouler on Personal Property, ‡ 604, whence paragraph derived.

§ 357. What constitutes seller's fraud.—*Fraudulent concealment.* There are circumstances under which a seller's concealment of facts known to him becomes fraudulent, notwithstanding he says nothing.<sup>1</sup> Thus among the instances where silence on the part of the seller carries with it the legal consequences of positive misrepresentation because it was the seller's duty to speak out, is that of selling fodder upon which poison has been spilled;<sup>2</sup> that of putting out a prospectus or advertisement with artful concealments, so as to give a false impression;<sup>3</sup> and that of wilfully hiding some internal defect which rendered the thing worthless.<sup>4</sup>

*Positive misrepresentations.* Confidence should not be placed in mere statements of the seller, not amounting to warranty.<sup>5</sup> But a buyer has a right to trust the seller as to matters not within his knowledge;<sup>6</sup> and as any seller may make an express warranty, so he is held to responsibility for false statements by way of inducement, even though the buyer might have ascertained the falsehood by inquiry.<sup>7</sup>

*Statements concerning price.* The principle has been recognized that a misrepresentation as to the market price of an article of general commerce, made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not avoid a contract therefor, when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price.<sup>8</sup> But where the seller agreed to sell a stock of staple groceries suitable for the buyer's trade, of first-class quality, at prices greatly below the current rates for such goods, and the buyers relied upon these representations and permitted the seller to select and ship the goods,<sup>9</sup> evidence is relevant,<sup>10</sup> which tends to show that the stock

of goods had been fraudulently billed and charged at current rates, and in some instances above current rates.<sup>11</sup>

1 2 Schouler on Personal Property, § 604.

2 French v. Vining, 102 Mass. 135.

3 Oakes v. Turquand, Law R. 2 H. L. 235.

4 Paddock v. Strobridge, 29 Vt. 420; Croyle v. Moses, 90 Pa. St. 250. Source of paragraph: 2 Schouler on Personal Property, § 604. Concealment of encumbrances upon title: Story on Sales, § 383; Sweetman v. Prince, 62 Barb. 256. Disclosure of defects customarily revealed: See Horsfall v. Thomas, 1 Hurl. & C. 90; Jones v. Bowden, 4 Taunt. 847; Story on Sales, § 384; Smith v. Hughes, Law R. 6 Q. B. 597.

5 See Manning v. Albee, 11 Allen, 522; Walker v. Pue, 57 Md. 155; 2 Schouler on Personal Property, § 603, making these citations in support of text.

6 2 Schouler on Personal Property, § 604.

7 2 Schouler on Personal Property, § 604; citing, Bank of Woodland v. Hiatt, 53 Cal. 234; Pennock v. Stygles, 54 Vt. 226; Redgrave v. Hurd, Law R. 20 Ch. D. 1. Knowledge of falsity of representations: Holden v. Ayer, 110 Ill. 448. Misrepresentation of material fact on sale of shares in electric light company: Coolidge v. Goddard, 77 Me. 578. Representation concerning profits of business: Taylor v. Saurman, 1 Atl. Rep. (Pa.) 40. Representation by director that bonds of corporation good: Drake v. Grant, 35 Hun, 464. Misrepresentations by executor concerning sale of stock: Keen v. James, 39 N. J. Eq. 527; 51 Am. Rep. 29.

8 See Graffenstein v. Epstein, 23 Kan. 443.

9 Cavender v. Roberson, 33 Kan. 626.

10 See Lord v. French, 61 Me. 420.

11 Cavender v. Roberson, 33 Kan. 626. False representation as to price paid: Richardson v. Noble, 77 Me. 390. Fraud on buyer; inadequate price: Wood v. Boynton, 64 Wis. 265; 54 Am. Rep. 610.

### ‡ 358. Buyer's remedies for fraud. — *Choice of remedies.*

Upon the discovery by the buyer of fraud in the representations inducing a sale of personal property, such as a stock of goods and the good-will of the business, he has his election to rescind the sale and return the property,<sup>1</sup> or to retain the property and prosecute his claim for damages either by an original action or as a counter-claim to an action against him for the purchase money, brought by the party committing the fraud.<sup>2</sup>

*Mode of rescission.* An acceptance of goods under a contract, when induced by the seller's fraud, leaves the

buyer still at liberty to rescind upon discovering the fraud;<sup>3</sup> but within a reasonable time after discovering the fraud, he must act upon his discovery by refusing to complete the purchase, if the goods are already delivered, or else returning or offering to return them, and demanding a return of the price if the goods are already paid for;<sup>4</sup> though the buyer is relieved from the obligation to return where the goods are of no value to seller or buyer,<sup>5</sup> or were destroyed in making the test necessary to show the fraud.<sup>6</sup> It has been recently held in substance that where the contract has been induced by fraud, it is not necessary that the buyer should absolutely tender what he has received, though he ought to give notice of his intention to rescind, and that he will not abide by the contract, and ought to be in a situation upon the trial to put the other party in the situation in which he was at the time of the discovery of the fraud.<sup>7</sup>

*Measure of damages.* The rule for the estimation of damages resulting from fraudulent representations in the sale of real and personal property is, to ascertain the difference between the value of the property as it actually existed on the day of sale and its value as it was represented to be.<sup>8</sup>

1 See citations in next note.

2 *Herefort v. Cramer*, 7 Colo. 483; citing, *Whitney v. Allaire*, 4 Denio, 556; *Lilly v. Randall*, 3 Colo. 298. And see *Cavender v. Roberson*, 33 Kan. 626; 7 Pacif. Rep. 152; citing, *Weybrich v. Harris*, 31 Kan. 92; 1 Pacif. Rep. 271; *Lord v. French*, 61 Me. 420; *Wheeler & Wilson Manuf. Co. v. Thompson*, 33 Kan. 491; 6 Pacif. Rep. 902.

3 *Dutchess Co. v. Harding*, 49 N. Y. 321. Rescission for fraud on buyer: *Gaty v. Holcomb*, 44 Ark. 216.

4 See *Gatling v. Newell*, 9 Ind. 572; *Matteson v. Holt*, 45 Vt. 336; *Pence v. Langdon*, 99 U. S. 578; *Hall v. Fullerton*, 2 Hill, 292; *Manahan v. Noyes*, 52 N. H. 232; *Garland v. Spencer*, 46 Me. 528; *Collins v. Townsend*, 58 Cal. 608; *Story on Sales*, § 458; *Bennett's Benjamin on Sales*, § 452. Consult, also, on return of consideration, *Johnson v. Frew*, 33 Hun, 193.

5 See various citations in last note, and *Brewster v. Burnett*, 125 Mass. 68; *Pence v. Langdon*, 99 U. S. 578.

6 See *Pacific Guano Co. v. Mullen*, 66 Ala. 582. Source of paragraph: 2 Schouler on Personal Property, § 605.

7 *American Wine Co. v. Brasher*, 13 Fed. Rep. 595, 603. And generally the latest decisions are quite lenient to the buyer in dispensing with a strict tender and other formalities of rescission, so long as he has not exercised acts of ownership while delaying, and so far as the informalities or delay are not set up by the defrauding party himself: 2 Schouler on Personal Property, § 605; referring to *Van Trott v. Wiese*, 36 Wis. 439; *Hendrickson v. Hendrickson*, 51 Iowa, 68; *Potter v. Taggart*, 54 Wis. 395; and quoting, *Spence v. Langdon*, 99 U. S. 578. Placing *in statu quo*, exercise of election, fraud, and warranty, liability for agent's acts, etc.: 2 Schouler on Personal Property, §§ 605-607. Fraudulent warranty suit: See, also, *Sweeney v. Vroman*, 60 Wis. 278. Freedom of principal for liability for unauthorized representations, etc., of agent: *Decker v. Fredericks*, 47 N. J. L. 469; stating doctrine of *Kennedy v. McKay*, 14 Vroom, 288.

8 *Herefort v. Cramer*, 7 Colo. 483; citing, *Morse v. Hutchins*, 102 Mass. 439; *Wright v. Roach*, 57 Me. 600.

§ 359. **Fraud on seller.**—*Passing of title or possession.* Whenever property is obtained from the owner by fraud, it is important to determine whether the facts show a sale to the party guilty of the fraud, or a mere delivery of it into his possession as a result of the fraudulent devices practiced.<sup>1</sup> In the former case, where the title passes and not the bare possession only, there is a contract of sale which is voidable only and not void,<sup>2</sup> so that the defrauded seller may at his option confirm or repudiate it, as the contract only becomes void after it has been avoided.<sup>3</sup>

*Seller's remedies.* Therefore in the case of a sale of goods induced by fraud of the vendee, the vendor may sue in assumpsit for the price, in affirmance of the contract, or in trover or replevin, in disaffirmance of it.<sup>4</sup>

*Protection of bona fide purchaser.* But until the vendor has done some act to disaffirm the transaction the property vests in the vendee, and hence an innocent transferee, for value, takes the title,<sup>5</sup> as the mere fact that the contract may be afterwards rescinded does not affect its intermediate efficiency.<sup>6</sup>

*False personation.* In cases of false personation, however, it has been held that no title passes,<sup>7</sup> but this distinction arises out of the consideration that no con-

tract is in such case made with the party personated, and none is contemplated with the false personator, so that the title remains in the vendor, and the transaction is wholly inoperative even as to third persons.<sup>8</sup>

*Burden of proof, creditors, etc.* One who claims to be a *bona fide* purchaser from the fraudulent buyer has the burden of showing that such is the case, as against the defrauded seller;<sup>9</sup> and no such claim can be maintained by the attaching or execution creditors of the buyer, who merely stand in his place in regard to the title he acquired.<sup>10</sup>

1 Alexander v. Swackhamer, 105 Ind. 81; 55 Am. Rep. 180. And see Neff v. Landis, 1 Atl. Rep. (Pa.) 177; 21 The Reporter, 60.

2 See § 200, on VOIDABLE OR DEFEASIBLE TITLE.

3 See Neff v. Landis, 1 Atl. Rep. (Pa.) 177; 21 The Reporter, 60. But fraud held to vitiate sale in Amer v. Hightower, 11 Pac. Rep. (Cal.) 697.

4 See Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 664; Neff v. Landis, 1 Atl. Rep. (Pa.) 177; 21 The Reporter, 60. Seller's remedies for fraud: 2 Schouler on Personal Property, § 613. Return of goods: Sharp v. Ponce, 76 Me. 350. Return of consideration before replevin suit: Doane v. Lockwood, 4 N. E. Rep. (Ill.) 500. Where sale under value, no waiver of action by taking price: Mallory v. Leach, 82 Am. Dec. 625. Effect of rescission: Doane v. Lockwood, 4 N. E. Rep. (Ill.) 500.

5 See Stevenson v. Newnham, 13 Com. B. 285; Mears v. Waples, 3 Houst. 581; Williams v. Given, 6 Gratt. 268; § 202, on TITLE OF FRAUDULENT VENDEE.

6 Neff v. Landis, 1 Atl. Rep. (Pa.) 177; 21 The Reporter, 60. And see Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 664; Alexander v. Swackhamer, 105 Ind. 81; 55 Am. Rep. 180; citing, Curme v. Rauh, 100 Ind. 247; Parrish v. Thurston, 87 Ind. 437. Protection of *bona fide* purchaser fully discussed: See §§ 197-203. Prevalence of exemption: § 204, citing the cases on the subject. And see Perkins v. Anderson, 19 The Reporter (Iowa), 112.

7 See § 205, on LIMITATIONS OF EXEMPTION.

8 Neff v. Landis, 1 Atl. Rep. (Pa.) 177; 21 The Reporter, 60.

9 See Devoe v. Brandt, 53 N. Y. 462; McLeod v. First Nat. Bank, 42 Miss. 99; Lynch v. Beecher, 38 Conn. 490; Porter v. Parks, 49 N. Y. 564. But compare *contra*, Mears v. Waples, 3 Houst. 581.

10 See Sargent v. Sturm, 23 Cal. 350; 83 Am. Dec. 118; Jordan v. Parker, 56 Me. 557; Thompson v. Rose, 16 Conn. 71; Hartt v. McNeil, 47 Mo. 526; Field v. Stearns, 42 Vt. 106; Devoe v. Brandt, 53 N. Y. 462; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; 42 Am. Rep. 53; Ensign v. Hoffield, 4 Atl. Rep. (Pa.) 189. Sources of paragraph: 2 Schouler on Personal Property, § 609; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; 42 Am. Rep. 53; Sargent v. Sturm, 23 Cal. 350; 83 Am. Dec. 118; "Title from Fraudulent Vendees," etc. 7 South. L. Rev. N. S. 549, 569. Purchaser from fraudulent vendor may give title to *bona fide* purchaser: Sharp v. Jones, 81 Am. Dec. 389.

§ 360. *Buyer's fraudulent devices.*—*Inducements to contract.* The fraudulent devices of the buyer, embracing any of the infinite phases of deceit, which make a sale voidable, except against a further innocent purchaser, may be the inducement to the contract, as in the case of misrepresentations of pecuniary standing,<sup>1</sup> forged recommendations,<sup>2</sup> and the like.<sup>3</sup>

*Concerning consideration.* So the fraudulent devices may touch the consideration, as where payment is made in worthless securities, fictitious bills, counterfeit money, or stolen property.<sup>4</sup>

*Design not to pay.* And the fraud may also arise from the intent of the vendee, as a preconceived design never to pay for the goods, if distinctly shown, is by the weight of American authority deemed sufficient ground for the vendor to avoid the sale, though there were no false representations or fraudulent pretenses.<sup>5</sup>

1 See *Luckey v. Roberts*, 25 Conn. 486; *Devoe v. Brandt*, 53 N. Y. 462; *Ensign v. Hoffield*, 4 Atl. Rep. (Pa.) 189. Representations as to credit: See *Lyon v. Briggs*, 14 R. I. 222; 51 Am. Rep. 372; *Genesee County Savings Bank v. Mich. Barge Co.* 52 Mich. 164. Buyer's false representations of ability to pay: *Cain v. Dickenson*, 60 N. H. 371. Representations through mercantile agency: *Deickeroff v. Brown*, 21 The Reporter (Md.) 583; citing, *Victor v. Hanlien*, 33 Hun, 549. Concealing indebtedness: *Newell v. Randall*, 32 Minn. 171; 50 Am. Rep. 562. Failure to disclose extent of borrowed capital: *Deickeroff v. Brown*, 21 The Reporter (Md.) 583. Buyer's fraud as to credit of a third party: 2 Schouler on Personal Property, § 612.

2 *Mowrey v. Walsh*, 8 Cowen, 238.

3 "Title from Fraudulent Vendees," etc. 7 South. L. Rev. N. S. 549, 563. Concealment of information, etc.: 2 Schouler on Personal Property, § 611.

4 See *Manning v. Albee*, 17 Allen, 520; *White v. Garden*, 10 Com. B. 919; *Cochran v. Stewart*, 21 Minn. 435; *Arnott v. Cloudas*, 4 Dana, 300; *Williams v. Given*, 6 Gratt. 268; *Green v. Humphrey*, 50 Pa. St. 212; *Titcomb v. Wood*, 33 Me. 563; *Lee v. Portwood*, 41 Miss. 109; *Arendale v. Morgan*, 5 Sneed, 783. Obtaining goods by false pretenses: § 206.

5 "Title from Fraudulent Vendees," etc. 7 South. L. Rev. N. S. 549, 563, and cases collected. Consult, also, *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53; *Bump on Purchases by Insolvents*, 6 South. L. Rev. N. S. 481, 485; *Thompson v. Taylor*, 15 Phila. 250; *Carnahan v. Balley*, 28 Fed. Rep. 519; *Lee v. Simmons*, 27 N. W. Rep. (Wis.) 174, n. 176; *Hanchett v. Mansfield*, 16 Ill. App. 407; *Catlin v. Warren*, 16 Ill. App. 418; *Burrill v. Stevens*, 73 Me. 395; 40 Am. Rep. 366; *Des Farges v. Pugh*, 93 N. C. 31; 53 Am. Rep. 446; *Taylor v. Mississippi Mills*, 1 South. Rep. (Ark.) 283.



§ 361. **Fraud upon creditors.**—*In general.* The fraud of parties to sales upon their creditors,<sup>1</sup> presents few questions peculiar to the law of sales.<sup>2</sup>

*Retention of possession.* Retention of possession of chattels by the seller is, in the United States, evidence more or less conclusive of fraud upon the rights of third parties;<sup>3</sup> but the main point of difference is whether such retention is only *prima facie* evidence of fraud or fraud *per se*.<sup>4</sup>

*Conclusiveness of presumption of fraud.* And while the general principle favored in England and in America is,<sup>5</sup> that possession affords only *prima facie* evidence of fraud, which may be sustained or rebutted by proof of other circumstances, yet the stricter doctrine has prevailed in the federal courts and in some of the States, that an absolute bill of sale unaccompanied by a corresponding change of possession, is of itself a fraud in law.<sup>6</sup>

*Statutory regulation.* Statute provisions on this subject exist in various States, as in New York, Maryland, Delaware, Missouri, Indiana, Iowa, Minnesota, Wisconsin, Nebraska, and California.<sup>7</sup>

*Requisites of delivery.* It is said to be now well settled that a change of location of the property is not in all cases essential, on the sale of a chattel, to constitute a valid delivery as against third persons, but that due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property.<sup>8</sup> And a transfer of personal property, accompanied by an actual, immediate, and continued change of possession, is not fraudulent as to creditors because made in consideration of a promise by the transferee to use the property in a certain manner, which would confer pecuniary profit on the transferrer.<sup>9</sup> But it has been held that the circum-

stances that the creditors knew of a sale, and practically conceded that the purchase was in good faith, in no manner operated as a waiver so as to relieve the purchaser from compliance with the peremptory terms of a statute, raising a conclusive presumption of fraud from want of the requisite change of possession.<sup>10</sup>

1 Consult generally on this subject, *Walden v. Murdock*, 23 Cal. 540; 83 Am. Dec. 135, n. 141. Bills of sale acts: See 2 Schouler on Personal Property, § 616, note on p. 629. No fraud in law: *Wall v. Wall*, 3 Atl. Rep. (Pa.) 25. Preference by insolvent: *Ross v. Sedgwick*, 10 Pacif. Rep. (Cal.) 400. Hindering, etc.: *Beckwith v. Burrough*, 14 R. I. 366; 51 Am. Rep. 392. Selling goods at discount not badge of fraud: *Barnes v. Foxen*, 53 Mich. 475. Selling on unusually long credit: *Spaulding v. Adams*, 63 Iowa, 437. Buyer's knowledge of fraudulent purpose insufficient: *Holmes v. Braidwood*, 82 Mo. 610.

2 Vendor's statements, etc.: *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114, n. 117. Return of excess: *Reeves v. Seeburn*, 16 Iowa 234; 85 Am. Dec. 513. Preference, counter-branding cattle, etc.: *Walden v. Murdock*, 23 Cal. 540; 83 Am. Dec. 135, n. 141. Intent to avoid liability for support of bastard child: *Schuster v. Stout*, 30 Kan. 529.

3 See Bennett's Benjamin on Sales, § 675, n. d, reviewing the cases; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Coburn v. Pickering*, 3 N. H. 415; *Rothchild v. Rowe*, 44 Vt. 389; *Ingalls v. Herrick*, 108 Mass. 351; *Clow v. Woods*, 5 Serg. & R. 275; *Capron v. Porter*, 43 Conn. 233; *Robbins v. Oldham*, 1 Duval, 28; *Gilbert v. Decker*, 53 Conn. 401.

4 2 Schouler on Personal Property, § 615. No presumption of fraud: *Jones v. Simpson*, 6 Sup. Ct. Rep. 533.

5 But see *Pregnall v. Miller*, 21 S. C. 385; 53 Am. Rep. 684, 685.

6 See 2 Kent Com. 520-532; Story on Sales, §§ 510-529; Bennett's Benjamin on Sales, 675, n. d; 2 Schouler on Personal Property, § 616; citing, also, Stats. 13 Eliz. ch. 5, and 27 Eliz. ch. 4; Stats. 17, 18 Vict. ch. 36; *Edwards v. Harben*, 2 Term Rep. 587. Concurrent possession: *Brawn v. Keller*, 43 Pa. St. 104; 82 Am. Dec. 554; *Hall v. Parsons*, 17 Vt. 271. Pre-existing debt, etc.: *Sargent v. Sturm*, 23 Cal. 350; 83 Am. Dec. 118, n. 122; *Pregnall v. Miller*, 21 S. C. 385; 53 Am. Rep. 684; *Dolan v. Van Denmark*, 10 Pacif. Rep. (Kan.) 848.

7 2 Schouler on Personal Property, § 616. See *Harter v. Donahoe*, 9 Pacif. Rep. (Cal.) 651; *Bassinger v. Spangler*, 10 Pacif. Rep. (Colo.) 803, 818; *O'Garra v. Lowry*, 5 Mont. 427; *McKee v. Bassick* Min. Co. 8 Pacif. Rep. (Colo.) 501.

8 *Cessna v. Nimick*, 4 Atl. Rep. (Pa.) 193. And see *Chase v. Garrett*, 1 Atl. Rep. (Pa.) 912. Delivery of animals and chattels generally: *Williams v. Lerch*, 56 Cal. 330. Insufficiency of stenciling of vendee's name on sides of railroad cars: *Rafferty v. McKenna*, 1 Atl. Rep. (Pa.) 546. Retaining old sign, etc.: *Brown v. Kimmel*, 67 Mo. 430; *Bassinger v. Spangler*, 10 Pacif. Rep. (Colo.) 809, 816. Actual and continued change of possession: *Stevens v. Irwin*, 15 Cal. 503; *Godchaux v. Mulford*, 26 Cal. 316; *Bassinger v. Spangler*, 10 Pacif. Rep. 809, 816; *O'Garra v. Lowry*, 5 Mont. 427. And see *Norton v. Doolittle*, 32 Conn. 405. Leaving carpets in brother's house: *Evans v. Scott*, 89 Pa. St. 136. Bill of sale Saturday and possession taken early Sunday

morning: *Kleinschmidt v. McAndrews*, 6 Sup. Ct. Rep. 761. Insufficiency of selecting, packing, marking, charging, etc.: *Davis v. Meyer*, 1 Southw. Rep. (Ark.) 95, n. 96. Brother's control of furniture in lodging-house: *Ross v. Sedgwick*, 10 Pacif. Rep. (Cal.) 400. Brother driving team sold: *O'Gara v. Lowry*, 5 Mont. 427. No change of custody or situation of cattle: *James v. Fulkerth*, 7 Pacif. Rep. (Cal.) 768. Exempt property: *Barton v. Brown*, 8 Pacif. Rep. (Cal.) 517. Notice to custodian: *Lufkins v. Collins*, 7 Pacif. Rep. (Idaho) 95.

9 *Lewin v. Hopping*, 8 Pacif. Rep. (Cal.) 73, n. 75, fully discussing subject of fraudulent transfer. Belief of vendee that price to be used in settling debts: *St. Louis Coffin Co. v. Rubelman*, 15 Mo. App. 280. Employment of vendor in subordinate capacity: *O'Gara v. Lowry*, 5 Mont. 427; *Godchaux v. Mulford*, 29 Cal. 325. Employment of vendor's brother: *Steele v. Miller*, 1 Atl. Rep. (Pa.) 434; 21 *The Reporter*, 92; citing, *Billingsley v. White*, 59 Pa. St. 464, 467; *McKibben v. Martin*, 64 Pa. St. 352. See, also, *Goldstone v. Nunan*, 19 *The Reporter*, (Cal.) 680. Sale by husband to wife: *Leavitt v. Jones*, 54 Vt. 423; 41 *Am Rep.* 849. Insolvent father's sale to daughter of mare kept on farm for a time: *McClure v. Torney*, 107 Pa. St. 414. Business carried on under same name: *Wolf v. Kahn*, 62 Miss. 814. Sufficient change of possession through day's delay, etc.: *O'Gara v. Lowry*, 5 Mont. 427. Wagon left in seller's possession, etc.: *Parker v. Marvell*, 60 N. H. 30. Storer of goods stating that they belonged to seller: *Wing v. Peabody*, 57 Vt. 19. Delivery unnecessary where logs on low, wet land: *Kingsley v. White*, 57 Vt. 565. Horse, etc., kept in barn of seller's house: *Ziegler v. Handrick*, 106 Pa. St. 57. Symbolical delivery, good transfer of possession: *Sharp v. Carroll*, 27 N. W. Rep. (Wis.) 82. Nailing up holes in corn-crib: *Pope v. Cheeney*, 27 N. W. Rep. (Iowa) 754, citing cases and discussing requisites. Delivery not practicable: *Kingsley v. White*, 57 Vt. 565; 20 *The Reporter*, 671, discussing cases. Transfer of coal-pits: *Tognini v. Kyle*, 45 *Am Rep.* 442. Property in possession of bailee: *Steele v. Miller*, 1 Atl. Rep. (Pa.) 434; 21 *The Reporter*, 92. And see *Campbell v. Hamilton*, 63 Iowa, 293.

10 *Bassinger v. Spangler*, 10 Pacif. Rep. (Colo.) 809, 816; citing, *Perrin v. Reed*, 35 Vt. 2; *Lawrence v. Burnham*, 4 Nev. 361. Bill of sale not enough: *Comaita v. Kyle*, 19 *The Reporter* (Nev.) 345. No change of possession; absolute changed to conditional sale: *Wagner v. Commonw.* 19 *The Reporter* (Pa.) 696.

## CHAPTER XXXI.

### ILLEGAL SALES.

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§ 362. In general.—*As utterly void.* A contract of sale which the law makes illegal, is not merely voidable, as it is when infected with fraud, but is utterly void and cannot be enforced on either side;<sup>1</sup> so that an innocent person who has been led into a bargain which he finds to be illegal, has no option but to drop it, as he can neither defend nor sue upon the bargain, and may render himself criminally liable if he goes on with the transaction.<sup>2</sup>

*At common law and under statute, etc.* There are illegal sales at the common law, and illegal sales founded in statute,<sup>3</sup> the effect of the illegality in the latter sense merely being liable to special regulation.<sup>4</sup>

*Mala in se and mala prohibita.* But the old distinction taken between *mala in se* and *mala prohibita*, though it has been said that the moral feeling and common sense of men do discriminate,<sup>5</sup> is not countenanced<sup>6</sup> by the later authorities.<sup>7</sup>

*Unlawful scope of contract.* And it is regarded as now well settled that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action,<sup>8</sup> as the law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect.<sup>9</sup>

*Knowledge or participation.* The doctrine sustained by the great weight of authority is said to be to the effect that knowledge alone by the vendor of the intended unlawful use of the property by the vendee, is not sufficient<sup>10</sup> to defeat the vendor's action against the vendee for the purchase price of goods sold and delivered;<sup>11</sup> but that it must further be shown that the vendor sold the goods for the purpose that the law should be violated, or that he had some interest in the violation of the law, or that he participated in some manner<sup>12</sup> in the unlawful purpose.<sup>13</sup>

*Executed and executory contracts.* In fact, courts do not like to relieve parties from their contracts after the contracts have been executed and performed on the other side,<sup>14</sup> and after the parties asking to be relieved have received and enjoyed all the fruits and benefits which they expected to receive or enjoy from their contracts;<sup>15</sup> and especially do courts not like to relieve those parties in such cases who have committed the principal wrongs themselves, and who plead their own wrongs for the purpose of being so relieved.<sup>16</sup>

*Want of moral turpitude.* But the various qualifications of the general rule are chiefly applied, by way of indulgence, to cases where the transaction involves no moral turpitude on the part of the party seeking a remedy, but is a violation of some statute against which public policy pronounces with some hesitation.<sup>17</sup>

1 See Story on Sales, § 485.

2 2 Schouler on Personal Property, § 617. Illegal sale as consideration for note: *Bowen v. Webber*, 28 N. W. Rep. (Iowa) 600.

3 See Story on Sales, § 486.

4 2 Schouler on Personal Property, § 617. It is a principle applying to contracts generally, that consent cannot receive legal effect so as to confer an active title upon one of the persons concerned, if the proposition consented to by him is either directly prohibited by authority, or involves conduct subversive of good morals or public policy: *Campbell on Sales*, 145. And see *Greenhood on Public Policy*, p. 1. The maxim is *in part delicto potior est conditio defendentis*: *In re Maplebuck*, Ex parte *Caldicott*, Law R. 4 Ch. D. 150. And see *Bennett's Benjamin*, § 504, n. c.

5 See *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205.

6 See *White v. Buss*, 3 Cush. 448, 450; 2 *Bouvier Law Dict.* tit. *Mala Prohibita* (14th ed.), 91.

7 2 Schouler on Personal Property, § 617. And see Story on Sales, § 483; *Greenhood on Public Policy*, p. 1; citing, *Evans v. City of Trenton*, 24 N. J. L. 764, 771.

8 *White v. Buss*, 3 Cush. 448. Illegality of some of the promises does not affect consideration of whole contract, unless it be indivisible: See *Carleton v. Woods*, 24 N. H. 290; *Boyd v. Eaton*, 44 Me. 51; *McKnight v. Devlin*, 52 N. Y. 393; *Thurston v. Percival*, 1 Pick. 415; *Gelpke v. Dubuque*, 1 Wall. 321; *Hanauer v. Gray*, 25 Ark. 350; *Erie R. Co. v. Union Express Co.* 35 N. J. L. 240; *Crookshank v. Rose*, 5 Car. & P. 19; *Hinde v. Gray*, 1 Man. & G. 195; *Lange v. Werk*, 2 Ohio St. 519; *Pecker v. Kennison*, 28 N. H. 230; *Waite v. Jones*, 1 Bing. N. C. 656; *Filson v. Hines*, 5 Pa. St. 452; Story on Sales, § 501; 2 Schouler on Personal Property, § 618; referring, also, to *Kottwitz v. Alexander*, 34 Tex. 689; *Chandler v. Johnson*, 39 Ga. 85; *Hanauer v. Doane*, 12 Wall. 342; *More v. Bonnet*, 40 Cal. 251; *Ladd v. Dillingham*, 34 Me. 316. And consult *Campbell on Sales*, 145, 146.

9 *White v. Buss*, 3 Cush. 448, 450. And see 2 *Corbin's Benjamin on Sales*, § 787, n. 1; Story on Sales, §§ 485-488; 2 Schouler on Personal Property, § 617; citing, *Montefiori v. Montefiori*, 1 Black. W. 363; *Canaan v. Bryse*, 3 Barn. & Ald. 179; *Concord v. Delany*, 58 Me. 309; *Watrous v. Blair*, 32 Iowa, 58; *Cameron v. Peck*, 37 Conn. 555; *Myers v. Meinrath*, 101 Mass. 366; *Brackett v. Edgerton*, 14 Minn. 174; *Hanauer v. Doane*, 12 Wall. 302; *Oscanyan v. Arms Co.* 103 U. S. 261; 8 Fed. Dec. 205; *Sampson v. Shaw*, 105 Mass. 149; *Horton v. Buffington*, 101 Mass. 400; *Peterson v. Christensen*, 26 Minn. 377.

10 See § 364, on INSUFFICIENCY OF MERE KNOWLEDGE.

11 *Distilling Co. v. Nutt*, 34 Kan. 724, 730, 731; 10 Pacif. Rep. 163. And see *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547. Compare § 363, on KNOWLEDGE OF GUILTY PURPOSE.

12 See § 365, on PARTICIPATION AND AIDING.

13 *Distilling Co. v. Nutt*, 34 Kan. 724, 731; 10 Pacif. Rep. 163.

14 See § 366, on EXECUTORY AND EXECUTED CONTRACTS.

15 *Distilling Co. v. Nutt*, 34 Kan. 724, 731; 10 Pacif. Rep. 163.

16 *Distilling Co. v. Nutt*, 34 Kan. 724, 731; 10 Pacif. Rep. 163. Besides the distinction made between mere knowledge and knowledge with something more, there is also a well recognized distinction between executed and executory contracts: *Distilling Co. v. Nutt*, 34 Kan. 724, 731.

17 2 Schouler on Personal Property, § 617. See § 363, on KNOWLEDGE OF GUILTY PURPOSE.

§ 363. **Knowledge of guilty purpose.**—*Want of.* The seller of goods may recover therefor, if he had no knowledge whatever of the buyer's guilty purpose, or merely reasonable cause to believe therein;<sup>1</sup> and hence to a certain extent, a transaction may be illegal on one side and not on the other, because of the different motives of the respective parties to the sale, the one being innocent and the other guilty.<sup>2</sup>

*Guilty party and purpose.* So the guilty party and the guilty purpose must often be separated;<sup>3</sup> for while it is unlawful for one to let premises for purposes of prostitution, or sell tools for the purpose of house-breaking, it is not unlawful to furnish a person with necessities of any kind because she happens to be a prostitute, or to make an innocent contract with a professional house-breaker.<sup>4</sup>

*Transactions clearly immoral.* But it is said that the best of the late English and American cases utterly repudiate the qualification in favor of requiring something more than guilty knowledge on a seller's part, save as applied to contemplated acts of inferior criminality, and completed criminal acts which the party sanctions, not assists, by his conduct.<sup>5</sup> Upon this distinction, whereby those sales alone are upheld in which the seller may possess knowledge of the buyer's illegal purpose, and yet sell without aiding to accomplish some heinous public offense,<sup>6</sup> are founded decisions which render the seller's guilty knowledge fatal to his rights, where he sells poison knowing that the buyer means to drug another with it,<sup>7</sup> or supplies goods for sustaining rebels in arms,<sup>8</sup> or vends a carriage to a prostitute to be used in aid of her vocation.<sup>9</sup>

1 See *Kottwitz v. Alexander*, 34 Tex. 689; *Prescott v. Norris*, 32 N. H. 101; *Buck v. Albee*, 26 Vt. 184; *Hotchkiss v. Finan*, 105 Mass. 86.

2 2 Schouler on Personal Property, § 617, whence paragraph derived.

3 2 Schouler on Personal Property, § 617, whence paragraph derived.

4 See Story on Sales, § 488; Bowry v. Bennett, 1 Camp. 348. But see Pearce v. Brooks, Law R. 1 Ex. 212.

5 2 Schouler on Personal Property, § 619.

6 See citations in succeeding notes.

7 Langton v. Hughes, 1 Maule & S. 593. And see McFarlane v. Taylor, Law R. 1 H. L. S. 245.

8 Martin v. McMillan, 65 N. C. 199; Hanauer v. Doane, 12 Wall. 342, 347. And see McGavock v. Puryear, 6 Cold. 34.

9 Pearce v. Brooks, Law R. 1 Ex. 212. It follows that the bargain for a thing in itself proper may become void from regard to the purpose for which it is to be applied, and one's guilty knowledge of that purpose: 2 Schouler on Personal Property, § 619, whence paragraph derived; here referring to Story on Sales, § 506, n.; Adams v. Coulliard, 102 Mass. 167; Sprott v. United States, 20 Wall. 459.

§ 364. *Insufficiency of mere knowledge.*—*In general.* The mere knowledge by the one party of the other's guilty purpose, where his own act may consistently be innocent, is often held insufficient to deprive him of his legal remedies, unless it further appear that he meant to enable the buyer to do the illegal act.<sup>1</sup>

*Of unlawful use in another State.* Thus mere knowledge by the vendor of goods lawfully sold in one State, that the vendee intends to use them in violation of law in another State, will not<sup>2</sup> defeat an action brought in such other State by the vendor against the vendee for the purchase price of the goods.<sup>3</sup>

*Counter-views discussed.* About the only authorities which are seemingly contrary to this proposition<sup>4</sup> are said not to furnish much opposition to the general doctrine stated.<sup>5</sup> Thus the Vermont decisions make a distinction between mere knowledge by the vendor of the illegal purpose of the vendee, and knowledge with the intent by the vendor to assist in carrying out such illegal purpose;<sup>6</sup> and declare it to be a recognized rule, now generally adopted both in this country and in England, that mere knowledge by the vendor of goods, selling them in a foreign state, that the vendee intends to



use them in violation of the laws of another State, is not sufficient to invalidate the contract, when sought to be enforced in the courts of the latter State.<sup>7</sup> So the later decisions in Massachusetts do not purport to overrule the previous decisions made in that State, but attempt to make a distinction,<sup>8</sup> by holding that it is not knowledge alone of the intended illegal sale which will defeat the action, but it is knowledge of such intended illegal sale, "with a view" that the intended illegal sale shall be consummated;<sup>9</sup> and "reasonable cause of belief" of such intended illegal sale is not sufficient.<sup>10</sup> And though the decisions in Iowa are made under a special statute, yet even in that State it is held that mere knowledge of the law alone will not render the contract invalid,<sup>11</sup> and it is stated that it is not held that mere knowledge on the part of the seller of the intended violation of the laws by the purchaser would necessarily vitiate or avoid the contract.<sup>12</sup> Furthermore, in a Maine case, also decided under an express statute, it was merely held that knowledge on the part of the vendor, and "acts beyond the mere sale, which aided the purchaser in his unlawful design," would defeat the action.<sup>13</sup>

1 See *Curtis v. Leavitt*, 15 N. Y. 9; *Bishop v. Honey*, 34 Tex. 245; *Armstrong v. Toler*, 11 Wheat. 258; *Hodgson v. Temple*, 5 Taunt. 181; *Tuttle v. Holland*, 43 Vt. 542; *Tracy v. Talmadge*, 11 N. Y. 162; 67 Am. Dec. 132; *Story on Sales*, § 506; 2 *Schouler on Personal Property*, § 217; citing, also, *McGavock v. Puryear*, 6 Cold. 34. Consult further succeeding portions of section. But see *Hanauer v. Doane*, 12 Wall. 342.

2 According to *Distilling Co. v. Nutt*, 34 Kan. 724.

3 *Feineman v. Sachs*, 33 Kan. 621, 625, 626; 52 Am. Rep. 547; 7 Pacif. Rep. 222, and following cases therein cited; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Holman v. Johnson*, 1 Cowp. 341; *Gaylord v. Soragen*, 32 Vt. 110; *McIntyre v. Parks*, 3 Met. 207; *Smith v. Godfrey*, 28 N. H. 379; *Orcutt v. Nelson*, 1 Gray, 536; *President etc. v. Spaulding*, 12 Barb. 302; *Tracy v. Talmadge*, 14 N. Y. 162; 67 Am. Dec. 132. And see *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. Andrews*, 41 Tex. 363; *Dater v. Earl*, 3 Gray, 482; *Tegler v. Shipman*, 33 Iowa, 195; *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Sortwell v. Hughes*, 1 Curt. 244.

4 *Territt v. Bartlett*, 21 Vt. 184; *McConihe v. McMann*, 27 Vt. 95; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167;

Davis v. Bronson, 6 Iowa, 411 ; Second Nat. Bank v. Curren, 36 Iowa, 555 ; Bancher v. Munsel, 47 Me. 58.

5 Distilling Co. v. Nutt, 34 Kan. 724 ; 10 Pacif. Rep. 163.

6 See Territt v Bartlett, 21 Vt. 184, 189, 190 ; McConihe v. McMann, 27 Vt. 95, 99.

7 Gaylord v. Soragen, 32 Vt. 112.

8 See citations in succeeding notes.

9 ——— v. ———, 74 Mass. 584.

10 Adams v. Coulliard, 102 Mass. 167.

11 Second Nat. Bank v. Curren, 36 Iowa, 555.

12 Tegler v. Shipman, 33 Iowa, 195, 200.

13 Bancher v. Munsel, 47 Me. 58 ; Samuel Bowman Distilling Co. v. Nutt, 10 Pacif. Rep. 163. See, also, Torrey v. Corliss, 33 Me. 333.

§ 365. **Participation and aiding.**—*Parties in pari delicto.* Participating in a guilty purpose, and being *in pari delicto*, must put the party altogether outside the law as to the guilty transaction :<sup>1</sup> for it has been said that no man shall set up his own iniquity as a defense any more than as a cause of action ;<sup>2</sup> and with regard to the illegal contract, the law will leave the parties where it finds them.<sup>3</sup>

*Aiding vendee in unlawful purpose.* Thus, if a sale of intoxicating liquors be made in Massachusetts, where the sale is legal, to a dealer in New Hampshire, for the purpose of resale there, in violation of the law, and the vendor agrees to aid, and does actually aid the vendee in his unlawful purpose, as by assisting him to conceal the contents of packages containing the liquors, such vendors can maintain no action in New Hampshire to recover the value of the liquors.<sup>4</sup> The mere knowledge of the unlawful intent of the vendee by the vendor would not bar him from enforcing his contract, and recovering in the courts of the State where the sale is illegal ;<sup>5</sup> but if the vendor in any way aids the vendee in his unlawful design to violate the laws of such State, such participation will prevent such vendor from maintaining an action.<sup>6</sup>

*Extent of participation.* Yet the participation must be active to some extent, and the vendor must do something in furtherance of the vendee's design to violate the laws of the State where the sale is illegal, though positive acts in aid of the unlawful purpose, even if slight, are sufficient.<sup>1</sup> And it is declared that a contract of sale of liquors in one State for use in another, contrary to the law of the latter State, should be held void, and not enforceable if the liquors were packed by the seller in such a manner as to conceal the contents of the package, and thus enable the buyer to accomplish his unlawful purpose; or if the illegal disposition of the goods by the purchaser in any way entered into the contract, and a greater price was agreed to be paid for the goods; or if the seller were to derive any advantage or share in the fruits of the buyer's wrong.<sup>8</sup>

*Relief for parties not in pari delicto, etc.* But where, in an extreme case, the parties to an illegal contract are not *in pari delicto*,<sup>9</sup> the party who has been oppressed, or of whose situation the other takes undue advantage, has been recognized as not without a remedy for recovering what was extorted from him.<sup>10</sup>

1 2 Schouler on Personal Property, § 617, whence paragraph derived.

2 Montefiori v. Montefiori, 1 Black. W. 363.

3 See White v. Buss, 3 Cush. 448.

4 Fisher v. Lord, 3 Atl. Rep. (N. H.) 927. And see Feineman v. Sachs, 33 Kan. 621; 52 Am. Rep. 547, 550.

5 See § 364, on INSUFFICIENCY OF MERE KNOWLEDGE. And a sale of intoxicating liquors in Missouri to be sold in Kansas contrary to the laws of that State may be enforced in Kansas, although the seller knew the illegal purpose of the buyer, provided he did not engage actively to promote or share in it: Feineman v. Sachs, 33 Kan. 621; 52 Am. Rep. 547.

6 Fisher v. Lord, 3 Atl. Rep. (N. H.) 927. In order to render void the sale of intoxicating liquors in one State to be disposed of in another contrary to its laws, and defeat a recovery of the price of the liquors, there must be some participation or interest of the seller in the act itself: Feineman v. Sachs, 32 Kan. 621; citing, Hill v. Speer, 50 N. H. 253; 9 Am. Rep. 205; Holman v. Johnson, Cowp. 348; Gay-

lord v. Soragen, 32 Vt. 110; Aiken v. Blaisdell, 41 Vt. 656; McIntire v. Parks, 3 Met. 207; Smith v. Godfrey, 8 Fost. 379; Orcutt v. Nelson, 67 Mass. 536; President etc. of the Merchants' Bank v. Spaulding, 12 Barb. 302; Tracy v. Talmadge, 14 N. Y. 162; 67 Am. Dec. 132.

7 Fisher v. Lord, 3 Atl. Rep. (N. H.) 927. A principal cannot reap the benefits of an illegal transaction which a third party, whom he employed, carried out, and wherein he participates by knowingly sanctioning the sale: 2 Schouler on Personal Property, § 620; citing, Nicholson v. Gooch, 5 El. & B. 999; Galligan v. Fennan, 7 Allen, 255. And in whatever capacity one unintentionally furthers the violation of law, his rights in the illegal transaction are excluded: See Story on Sales, §§ 505, 506.

8 Feineman v. Sachs, 23 Kan. 621; 32 Am. Rep. 547, 550.

9 See Story on Sales, § 496 a.

10 2 Schouler on Personal Property, § 617; citing Jacques v. Golightly, 2 Black. W. 1073; Worcester v. Laton, 11 Mass. 368; Concord v. Delaney, 58 Me. 309; Butler v. Northumberland, 50 N. H. 33; White v. Franklin Bank, 22 Pick. 281; Tracy v. Talmadge, 14 N. Y. 162; 67 Am. Dec. 132.

§ 366. **Executory and executed contracts.**—*Disaffirmance before execution.* The disaffirmance of the contract in its initial stage, and before the transaction is completely executed, might leave a party in favorable situation for resorting to the courts;<sup>1</sup> for it is the tenor of late decisions,<sup>2</sup> that money or goods are reclaimable where the unlawful agreement is executory only.<sup>3</sup>

*Complete execution.* But neither law nor equity will reopen the transaction whenever an illegal contract of sale has been carried out fully,<sup>4</sup> all acts of delivery completed, and the price paid.<sup>5</sup>

1 Tracy v. Talmadge, 14 N. Y. 162; 67 Am. Dec. 132. Comity or the conflict of laws is sometimes set up as a cause of indulgence in this connection: See Hill v. Spear, 50 N. H. 253; 9 Am. Rep. 205; Castuque v. Imrie, Law R. 4 H. L. 414.

2 According to 2 Schouler on Personal Property, § 617, whence paragraph derived.

3 See Taylor v. Bowers, Law R. 1 Q. B. D. 291; Spring Co. v. Knowlton, 103 U. S. 49.

4 See Distilling Co. v. Nutt, 34 Kan. 724, 731; 10 Pacif. Rep. 163.

5 2 Schouler on Personal Property, § 618; citing, White v. Buss, 3 Cush. 448; Story on Sales, § 488.

§ 367. **Sales illegal at common law.**—*In general.* There are a number of classes of sales which may be pronounced illegal at common law, irrespective of legisla-

tion, although the offense may likewise be recognized in statutory enactments.<sup>1</sup>

*Immoral objects.* Thus whatever contravenes public decency and good morals, as sales for purposes of prostitution,<sup>2</sup> and sales of obscene books or pictures,<sup>3</sup> must be pronounced clearly illegal and void.<sup>4</sup>

*Dangerous things.* So the sale of poison, or of murderous or burglarious implements, is illegal when in aid of felonious designs against life or property.<sup>5</sup>

*Treasonable and smuggling transactions.* And among other classes of sales void at common law, though concerning offenses largely regulated by statute, are sales to a public enemy,<sup>6</sup> or in aid of treason,<sup>7</sup> as well as smuggling contracts of sale,<sup>8</sup> though as to these in particular, the English law has ever been more solicitous of offenses against its own enactments than against those of other countries.<sup>9</sup>

1 2 Schouler on Personal Property, § 621. Forestalling, etc.; See 4 Blackst. Com. 148.

2 See *Pearce v. Brooks*, Law R. 1 Ex. 213. Compare *Bowry v. Bennett*, 1 Camp. 348. And consult *Story on Sales*, §§ 206, 488. Knowledge of purpose; sale equivalent to lease of bawdy-house: *Sprague v. Rooney*, 82 Mo. 493; 52 Am. Rep. 383.

3 See *Poplett v. Stockdale*, Ryan & M. 337; *Fohres v. Johnes*, 4 Esp. 497.

4 2 Schouler on Personal Property, § 621. And see *Bennett's Benjamin on Sales*, § 504; *Campbell on Sales*, 146; *Story on Sales*, § 433.

5 See *Langton v. Hughes*, 1 Maule & S. 593; *Roberts v. Egerton*, Law R. 9 Q. B. 494; as cited in support of text in 2 Schouler on Personal Property, § 621.

6 See *Brandon v. Nesbitt*, 6 Term Rep. 23.

7 See *Hanauer v. Doane*, 12 Wall. 342; *Hanauer v. Woodruff*, 15 Wall. 439; *Sprott v. United States*, 20 Wall. 459.

8 See *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Creekmore v. Chitwood*, 7 Bush, 317; *Story on Sales*, §§ 507, 508.

9 2 Schouler on Personal Property, § 621. And see *Campbell on Sales*, 146; *Bennett's Benjamin on Sales*, §§ 510, 511; citing, *Biggs v. Lawrence*, 3 Term Rep. 454; *Clugas v. Pentaluna*, 4 Term Rep. 466; *Holman v. Johnson*, 1 Cowp. 341; *Waymell v. Reed*, 5 Term Rep. 599; *Pellecat v. Angell*, 2 Crompt. M. & R. 311.

§ 368. Violation of public policy.—*In general.* Many classes of contracts are against public policy, and there-

fore illegal,<sup>1</sup> so that the courts will neither enforce them while executory, nor relieve a party from loss by part performance.<sup>2</sup>

*What constitutes public policy.* And though public policy is a variable thing,<sup>3</sup> which is in its nature uncertain and indefinite, fluctuating with the changes of habits and opinions, with the growth of commerce, and with the enlargement of international intercourse,<sup>4</sup> yet it is said that this rule may be safely laid down, that whatever contravenes an actual rule of policy, or is clearly shown to interfere injuriously with the true interests of society, is against public policy.<sup>5</sup>

*Combinations concerning commodities.* The change which takes place in views of what constitutes public policy, is shown by the fact that at present it is a common practice to form combinations concerning the supply of commodities, and that these are not usually regarded as illegal, except where they amount to wagering contracts;<sup>6</sup> while the common law, abhorring all attempts on the part of speculators to control the market, and following narrow views of trade formerly entertained, pronounced "forestalling, regrating, and engrossing,"<sup>7</sup> contrary to public policy, and illegal.<sup>8</sup> Nor do the classes of transactions void as against public policy include "gold" sales in a period of paper money as legal tender, or stock sales, though these are sometimes akin to gambling.<sup>9</sup>

1 2 Schouler on Personal Property, § 621. Illustrative instances: agreement to construct railroad through particular place (Baltimore etc. R. R. Co. v. Ralston, 41 Ohio St. 573); railroad pooling contract (Central Trust Co. v. Ohio Cent. R. R. Co. 23 Fed. Rep. 306); exclusive telegraph privilege: West. Union Tel. Co. v. Balt. etc. Tel. Co. 23 Fed. Rep. 12; Balt. etc. Tel. Co. v. West. Union Tel. Co. 24 Fed. Rep. 319.

2 Story on Sales, § 489; citing, Foote v. Emerson, 10 Vt. 344.

3 See Richardson v. Mellish, 2 Bing. 242; Hilton v. Eckersley, 6 El. & B. 47; Printing etc. Co. v. Sampson, 19 Eq. 465; Rousillon v. Rousillon, Law R. 14 Ch. D. 365; Bennett's Benjamin on Sales, §§ 512, 513 a.

4 Story on Sales, § 489.

5 Story on Sales, §§ 489, 490. And see 2 Schouler on Personal Property, § 621; citing, *Richardson v. Mellish*, 2 Bing. 242; *Crawford v. Russell*, 62 Barb. 92.

6 See § 363, on WAGERING CONTRACTS.

7 See these titles in Bouvier Law Dict.

8 See 4 Blackst. Com. 158; Story on Sales, § 490; Bennett's Benjamin on Sales, § 514, 515; Stats. 7, 8 Vict. ch. 24; 2 Schouler on Personal Property, § 62.

9 2 Schouler on Personal Property, § 621; citing, *Brown v. Speyers*, 20 Gratt. 296; *Appleman v. Fisher*, 34 Md. 540.

### § 369. Wagering contracts.—*Payment of differences.*

It makes no difference that a bet or a wager is made to assume the form of a contract, as gambling is none the less such because it is carried on in the guise of legitimate trade.<sup>1</sup> And if under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is non-actionable.<sup>2</sup>

*Illegal intent.* But in order to affect the contract, the alleged illegal intent must have been mutual,<sup>3</sup> and the intent of one party will not avail if not communicated to the other, or concurred in by such other.<sup>4</sup> So the law presumes the true intention of parties is that which is expressed upon the face of their contracts, and also that men in their business transactions do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy.<sup>5</sup> Hence, when one party charges that the contract is infected with an illegal intent, the burden of proof is imposed upon him to establish this allegation.<sup>6</sup>

*Subsequent settlements.* Furthermore, the validity of the contract depends upon the state of things existing

at its date,<sup>7</sup> and is not affected by subsequent agreements under which the parties voluntarily assent to a settlement on the basis of differences in price.<sup>8</sup> And parties to such contracts have the same liberty to settle their transactions by common consent according to their own discretion, which is accorded to parties to other contracts.<sup>9</sup>

*Future delivery.* The law is now perfectly settled that an executory contract for the sale of goods for future delivery, is not infected with the quality of a wager by reason of the fact that at its date the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them except by subsequently going into the market and buying them;<sup>10</sup> and the contrary doctrine<sup>11</sup> has been distinctly and repeatedly overruled.<sup>12</sup> It therefore necessarily follows that the failure to identify the particular goods sold does not affect the matter,<sup>13</sup> because, from the very nature of the contract, the sale is not of ascertained goods, but of articles of a designated kind and quality to be selected hereafter.<sup>14</sup> And a contract for the sale of goods to be delivered in future is not of itself void, though the vendor neither has the goods nor has provided for their delivery, when by the rules of the exchange in which the transaction is made, it is provided that there shall not be a settlement of differences, but that the contract shall be performed.<sup>15</sup>

1 Conner v. Robertson, 37 La. An. 814, 818; 55 Am. Rep. 521, whence succeeding paragraphs derived. Stocks, wagering contracts, etc.. Budland v. Smith, 139 Mass. 492; Earl v. Howell, 14 N. C. 474.

2 See Irwin v. Williar, 110 U. S. 459, 508, 509.

3 See citations in next note.

4 See Grizewood v. Blane, 11 Com. B. 536; Knight v. Cambers, 15 Com. B. 562; Ashton v. Dakin, 4 Hurl. & N. 867; Kingsbury v. Kirwan, 77 N. Y. 613; Cassard v. Himman, 1 Bosw. 207; 6 Bosw. 8; Smith v. Bouvier 70 Pa. St. 325; Rumsey v. Berry, 65 Me. 570; Sawyer v. Taggart, 14 Bush, 729; Williams v. Tiedeman, 6 Mo. App. 269; Pixley v. Boynton, 79 Ill. 351; Clark v. Foss, 7 Biss. 540.



5 Conner v. Robertson, 37 La. An. 814, 818; 55 Am. Rep. 521, whence succeeding paragraph derived.

6 See Irwin v. Williar, 110 U. S. 499; Frost v. Clarkson, 7 Cowen, 24; Dykers v. Townsend, 24 N. Y. 57; Pixley v. Boynton, 79 Ill. 351; Williams v. Tiedeman, 6 Mo. App. 269; Rumsey v. Berry, 65 Me. 570.

7 Conner v. Robertson, 37 La. An. 814, 819.

8 See citations in next note.

9 Clark v. Foss, 7 Biss. 540; Williams v. Tiedeman, 6 Mo. App. 269; Sawyer v. Taggart, 14 Bush, 729; Fareira v. Gabell, 89 Pa. St. 83.

10 Conner v. Robertson, 37 La. An. 814, 819; 55 Am. Rep. 521, whence paragraph derived.

11 Announced in Lorymer v. Smith, 1 Barn. & C. 1; Bryan v. Lewis, Russ. & M. 386.

12 See Hibblewhite v. McMorine, 5 Mees. & W. 462; Mortimer v. McCallan, 6 Mees. & W. 58; Irwin v. Williar, 110 U. S. 499, and nearly every case before cited in section.

13 See citations in next note.

14 Sawyer v. Taggart, 14 Bush, 729. And is discharged by the delivery of articles answering to the general description given in the contract: Sawyer v. Taggart, 14 Bush, 729. Source of paragraph: Conner v. Robertson, 37 La. An. 814, 819; 55 Am. Rep. 521.

15 Conner v. Robertson, 37 La. An. 814; 55 Am. Rep. 521; 22 The Reporter, 112. Future delivery of wheat; differences: Whitsides v. Hunt, 97 Ind. 191; 49 Am. Rep. 441.

§ 370. Concerning public offices and officers.—*Sales of offices or their emoluments.* On general grounds of public policy, but with a special view to the pure administration of civil government, the sale of a public office, or the transfer of property in consideration of procuring a public office, or the parceling out of the profits of such an office between the office-holder and another, is void;<sup>1</sup> and by whatsoever device such a consideration is embodied in a sale contract, the bargain must fail as illegal.<sup>2</sup>

*Influencing public officers.* A sale is also illegal whose moving consideration is the influencing of a public officer, or of one dealing with such officer in the discharge of his duty;<sup>3</sup> and lobbying contracts, whether for fixed or contingent fees, are likewise illegal, as tending to corrupt legislation, as are other contracts founded upon the consideration of influencing public officers to perform certain official acts,<sup>4</sup> though a sufficient basis

for a legitimate claim for compensation might be found in services of no sinister nature, as in procuring testimony, conducting or hearing, or making an argument in furtherance of legislative or executive, as well as judicial procedure.<sup>5</sup>

*Affecting elections.* All sales in consideration of carrying or influencing public elections are void.<sup>6</sup>

1 See citations in next note.

2 2 Schouler on Personal Property, § 622; citing, *Wells v. Foster*, 8 Mees. & W. 149; *Filson v. Himer*, 5 Pa. St. 452; *Hunter v. Nolf*, 71 Pa. St. 282; *Gray v. Hook*, 4 Comst. 449; *Mayor of Dublin v. Hayes*, 10 I. R. C. L. 226. Consult *Story on Sales*, § 494; *Bennett's Benjamin on Sales*, §§ 516-519; *Campbell on Sales*, 146-150.

3 See *Cook v. Shipman*, 51 Ill. 316; *Richardson v. Crandall*, 48 N. Y. 348; *Weld v. Lancaster*, 56 Me. 453.

4 See citations in next note.

5 See *Mills v. Mills*, 40 N. Y. 543; *Bowman v. Coffroth*, 59 Pa. St. 19; *Trist v. Child*, 21 Wall. 441; 2 Schouler on Personal Property, § 622, whence paragraph derived; here referring, also, to *Winpenny v. French*, 18 Ohio St. 469; *Sedgwick v. Stanton*, 4 Kern. 289.

6 See *Martin v. Wade*, 37 Cal. 168; *Swayze v. Hull*, 3 Halst. 54; *Duke v. Asbee*, 11 Ired. 112; 2 Schouler on Personal Property, § 262, so citing these cases.

§ 371. **Concerning litigation.**—*Champerty and maintenance.* With especial reference to the purity of judicial administration, and the sanctity of private rights, the courts have generally repudiated as illegal the sale of lawsuits, mentioning under this head the kindred offenses of champerty and maintenance.<sup>1</sup>

*Relaxation of common-law rules.* But the ancient common-law rules against one party's intermeddling with another's right to litigate<sup>2</sup> are greatly relaxed under the influence of equity and the modern practice acts.<sup>3</sup>

1 2 Schouler on Personal Property § 262. Illegal contract between attorneys, following up bankrupt. *Redick v. Woolworth*, 17 Neb. 260; 52 Am. Rep. 410. Champerty and maintenance: Consult *Bennett's Benjamin on Sales*, §§ 528, 529; *Campbell on Sales*, 151; titles named in *Bouvier Law Dict.*; 4 *Blackst. Com.* 134; *Stanley v. Jones*, 7 Bing. 369; *Hutten v. Hutten*. *Law R.* 8 Q. B. 112.

2 See 1 *Bouvier Law. Dict.* tit. Champerty (14th ed.), 254.

3 2 Schouler on Personal Property, § 262. And see Sedgwick v. Stanton, 4 Kern. 289, 301; Scott v. Harmon, 103 Mass. 237. Consult Fowler v. Callan, 7 N. E. Rep. (N. Y.) 169, n. 171; Courtwright v. Burnes, 13 Fed. Rep. 317, n. 323-330, fully discussing general subject of champerty.

§ 372. *Restraint of trade.—In general.* No contract of sale is good which is in general restraint of trade, as this is in derogation of private rights, and tends to monopoly,<sup>1</sup> though a contract is valid which imposes upon consideration a partial restraint, if the restraint be kept within reasonable bounds.<sup>2</sup>

*Restraint in time.* While the restraint stipulated for might be in time instead of space,<sup>3</sup> yet it would appear that restraint in space is now the only decisive cause of avoidance,<sup>4</sup> since partial restraint as to space is frequently upheld, though unlimited<sup>5</sup> as to time.<sup>6</sup>

*Restraint in space.* A restraint is generally regarded as void because general, where it is intended to operate through the realm, as in Great Britain, or through the whole State, as it would be ruled in this country;<sup>7</sup> but it has been considered that there is no rule laid down as to the invalidity of a restraint which is unlimited in point of space, but that the sole test is the reasonableness or unreasonableness of the restraint at issue.<sup>8</sup> It is only in partial restraint of trade, and therefore permissible for a seller to stipulate that he will not carry on the business within the circuit of his usual custom as then definable, or of a particular municipality.<sup>9</sup>

1 Vending of patent rights or copyrights does not contravene this rule: See Leather Cloth Co. v. Lorsent, Law R. 3 Eq. 345; Bryson v. Whitehead, 3 Sim. & St. 74; Morse Twist Co. v. Morse, 103 Mass. 73.

2 2 Schouler on Personal Property, § 623. And see Story on Sales, § 492; Campbell on Sales, 150. It is said that contracts in restraint of trade, if upon a sufficient consideration, are good as to particular localities when reasonable, but such a contract without limitation as to time or place is declared to have never been sustained either in this country or in England: Taylor v. Saurman, 1 Atl. Rep. (Pa.) 40; citing, Keeler v. Taylor, 53 Pa. St. 467; Gomperz v. Rochester, 56 Pa. St. 154; Harkinson's Appeal, 73 Pa. St. 196.

3 See *Ward v. Byrne*, 5 Mees. & W. 548; *Bennett's Benjamin on Sales*, § 524.

4 But it has recently been said that an agreement not to engage in the same business at any time is void and unenforceable, as against public policy, since the law will not allow a man to strip himself of the means of livelihood: *Taylor v. Saurman*, 1 Atl. Rep. (Pa.) 40.

5 See *Story on Sales*, § 493.

6 2 *Schouler on Personal Property*, § 623; citing, *Bennett's Benjamin on Sales*, 524; *Hitchcock v. Coker*, 6 Ad. & E. 438; *Guerand v. Dandelet*, 32 Md. 561.

7 See *Mallan v. May*, 13 Mees. & W. 511; *Hinde v. Gray*, 1 Man. & G. 195; *Taylor v. Blanchard*, 13 Allen, 370; *Lange v. Werk*, 2 Ohio St. 519; *More v. Bonnet*, 40 Cal. 251.

8 *Leather Cloth Co. v. Lorsent*, Law R. 9 Eq. 345; *Rousillon v. Rousillon*, Law R. 14 Ch. D. 351. Source of paragraph: 2 *Schouler on Personal Property*, § 623.

9 See *Guerand v. Dandelet*, 32 Md. 561; *Warren v. Jones*, 51 Me. 146; *Jenkins v. Temples*, 39 Ga. 655; *Whitney v. Slayton*, 40 Me. 224; 2 *Schouler on Personal Property*, § 623, so citing these cases. Agreement not to practice dentistry within certain limits: *Bowers v. Whittle*, 63 N. H. 147; 56 Am. Rep. 499. Agreement not to manufacture or sell friction matches outside of one State or Territory: *Diamond Match Co. v. Roeber*, 35 Hun, 421. Engagement not to carry on same business: for five years, without limitation of place (see *Wiley v. Baumgardner*, 97 Ind. 66; 49 Am. Rep. 427; and compare *Johnson v. Gwinn*, 100 Ind. 466); within city and vicinity: *Timmerman v. Davis*, 52 Mich. 34; 50 Am. Rep. 240. And compare *Paxson's Appeal*, 106 Pa. St. 429.

§ 373. *Transfer of good-will.*—*Not illegal.* A sale of one's "good-will" is not illegal,<sup>1</sup> nor even, as it is held, is the promise to influence the public to deal with the buyer as the seller's successor.<sup>2</sup>

*Engaging in same business.* And the right of one who has sold out the good-will of his business to carry on the same business in the buyer's immediate vicinity is a matter for reasonable interpretation, according to the sense of the parties, with the qualification that the seller should not be allowed to overreach the buyer in such a bargain.<sup>3</sup>

*Remedies.* A breach of stipulations in an agreement for the sale of a business, assuming that they amount to a parting with the good-will and a covenant not to engage in business again, is no ground for rescinding the contract and suing in tort for deceit in making it.

but the remedy is by action for damages for breach of contract.<sup>4</sup>

1 "Good-will" discussed: 14 Am. Law Reg. N. S. 1, 329, 649, 713; 19 Cent. L. J. 362. And see *Barber v. Conn. Mut. Life Ins. Co.* 15 Fed. Rep. 312, n. 315; *Herefort v. Cramer*, 7 Colo. 483; 15 The Reporter, 581, 582; *Wallingford v. Burr*, 17 Neb. 137, 138, 139; *Bergamini v. Bastian*, 35 La. An. 60; 48 Am. Rep. 216, n. 223.

2 See *Hoyt v. Holly*, 39 Conn. 226; *Warfield v. Booth*, 33 Md. 63; as cited, 2 Schouler on Personal Property, § 623.

3 See *Mouflet v. Cole*, Law R. 7 Ex. 70; *Bradford v. Peckham*, 9 R. I. 250; *Labouchere v. Dawson*, Law R. 13 Eq. 322; so cited, 2 Schouler on Personal Property, § 623. The rule precluding the seller of a good-will from soliciting former customers does not extend to compulsory sales, such as those made by trustees in bankruptcy: *Walker v. Mottram*, Law R. 19 Ch. D. 355.

4 *Taylor v. Saurman*, 1 Atl. Rep. (Pa.) 40. Evidence of damages by impairment of good-will: *Burckhardt v. Burckhardt*, 42 Ohio St. 474; 51 Am. Rep. 842.

§ 374. Violation of statutes.—*Various instances.* Sales whose illegality depends more especially upon legislation include various classes, such as those in violation of acts against lotteries, acts requiring licenses,<sup>1</sup> or otherwise imposing taxes, acts regulating the sale of noxious articles, acts enforcing certain requirements as to weight and measure, inspection acts, and the like,<sup>2</sup> some of which pursue a theory of morals which the common law did not clearly sanction, while others are rather to facilitate the operations of government.<sup>3</sup>

*Imposing penalty, etc.* The courts have distinguished between statutes which expressly prohibit the transaction, and those which only prohibit it by implication, as by imposing penalties for disobedience, though every such question must be tested by the true intent of the parties to render the contract illegal or not;<sup>4</sup> and even the imposition of a penalty, as in a case where one is required to take out a license on the basis of his average sales, may sometimes justify an inference that the party general business should bear the consequences of non-compliance with the legislative enactment, and not particular sales with individuals.<sup>5</sup>

1 Illegal sales without license: *Mandelbaum v. Gregovich*, 17 Nev. 87; 45 Am. Rep. 433. Sale to licensed Indian trader sustained: *Dunn v. Carter*, 30 Kan. 294.

2 Unsurveyed lumber: *Richmond v. Foss*, 77 Me. 590, 591; distinguishing *Abbott v. Goodwin*, 37 Me. 203, and *Rogers v. Humphreys*, 39 Me. 302. Fertilizer not branded, etc.: *Conley v. Sims*, 71 Ga. 161. English Food and Drugs Act; misrepresentation corrected before sale: *Kirk v. Coats*, Law R. 16 Q. B. D. 49. Bread in carts without weights or scales: *Ridgway v. Ward*, Law R. 14 Q. B. D. 110. And see *Daniel v. Whitfield*, Law R. 15 Q. B. D. 408.

3 2 Schouler on Personal Property, § 624. And see generally, *Story on Sales*, § 499; *Bennett's Benjamin on Sales*, § 540; *Campbell on Sales*, 152, 153.

4 See *Cope v. Rowlands*, 2 Mees. & W. 149; *Forster v. Taylor*, 5 Barn. & Adol. 887; *Coombs v. Emery*, 14 Me. 404; *Aiken v. Blaisdell*, 41 Vt. 655; *Miller v. Post*, 1 Allen, 434; *Larned v. Andrews*, 106 Mass. 435; *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Harris v. Runnels*, 12 How. 79; 1 Schouler on Personal Property, § 265; *Story on Sales*, § 498; *Bennett's Benjamin on Sales*, § 520; *Campbell on Sales*, 152.

5 See *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655. So cited, 2 Schouler on Personal Property, § 624, whence paragraph derived. Usury as tainting sale: See *Schermerhorn v. Talman*, 11 N. Y. 93.

§ 375. Sales of intoxicating liquors.—*In general.* Prominent among the classes of sales made illegal by statute are those of spirituous and intoxicating liquors,<sup>1</sup> concerning which legislation is constantly changing in the various States, so that the numerous decisions possess little more than local importance.<sup>2</sup>

*Scope of legislation.* It is settled that these statutes are not in contravention of the fundamental law of the land;<sup>3</sup> and a broad issue for all such legislation is,<sup>4</sup> as to whether the sale of liquor shall be altogether illegal, or only illegal where the seller has taken out no license.<sup>5</sup>

*Conflict of State laws.* Where goods which have been ordered, such as intoxicating liquors, are forwarded by a vendor in one State, where their sale is lawful, through a common carrier, with instructions to collect the price thereof from the vendee in another State, where their sale is illegal, and the carrier is not to deliver the goods without receiving the price, the sale is

not complete until the condition precedent of the payment of the price is fulfilled,<sup>6</sup> and hence the vendor becomes subject to any penalties prescribed by law in the second State for such illegal sale.<sup>7</sup> So where intoxicating liquors are sold in a State under whose laws the sale is illegal and void, and such sale is made for the purpose of enabling the buyer to violate the law of the State, an action brought in another State against the acceptor of a note given for the price of the liquor cannot be sustained;<sup>8</sup> and this is the case, although the sale was made by an agent of the payee of the note, without the knowledge of the principal.<sup>9</sup>

1 Sale of liquors without license: *United States v. Cline*, 26 Fed. Rep. 515. Place of sale: *Garbracht v. Commonwealth*, 96 Pa. St. 449; 42 Am. Rep. 550. Knowledge of unlawful purpose: *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547. And see *Distilling Co. v. Nutt*, 54 Kan. 724; 10 Pac. Rep. 163.

2 2 Schouler on Personal Property, § 625.

3 *Bartemeyer v. Iowa*, 18 Wall. 129.

4 According to 2 Schouler on Personal Property, § 625, whence paragraph derived.

5 See *Butter v. Northumberland*, 50 N. H. 33; *Yaeger Milling Co. v. Brown*, 128 Mass. 171; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Dolson v. Hope*, 7 Kan. 161. English Tipping Acts: See *Bennett's Benjamin on Sales*, §§ 543, 544.

6 *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 557. And see *U. S. v. Shriver*, 23 Fed. Rep. 134; 31 Alb. L. J. 163.

7 *State v. O'Neil*, 58 Vt. 140; 2 Atl. Rep. 486; 22 The Reporter, 58.

8 *Weil v. Golden*, 6 N. E. Rep. (Mass.) 229.

9 *Weil v. Golden*, 6 N. E. Rep. (Mass.) 229.

§ 376. *Sunday sales.*—*At common law and in England.* At common law, sales on Sunday seem not to have been void, but under English statutes for the past two centuries or more, the prohibition against Sunday trading has remained in force to this day.<sup>1</sup>

*In United States.* Similar enactments, more or less comprehensive in scope, are to be found in nearly all of the United States, usually making works of necessity and charity<sup>2</sup> the basis of an excepting proviso.<sup>3</sup>

*Liberal construction of enactments.* But the disposition is frequently shown at the present day, to mitigate the severity of such legislation by liberally construing the Sunday laws;<sup>4</sup> and a sale void under such an enactment would appear good wherever a fresh promise passes between the parties on a subsequent day, or the execution of the bargain<sup>5</sup> made on Sunday occurs on some other day of the week,<sup>6</sup> while the bargain may hold in favor of an innocent party, as where the execution of the contract by the one in violation of the Sunday law was unknown to the other.<sup>7</sup>

1 2 Schouler on Personal Property, § 625. And see Bennett's Benjamin on Sales, §§ 552-554; Campbell on Sales, 155, 156, and cases reviewed; Drury v. Defontaine, 1 Taunt. 131; Bloxsome v. Williams, 6 Barn. & C. 232.

2 Sunday subscription for work of charity held not void: Allen v. Duffie, 43 Mich. 1. And see Dale v. Knapp, 98 Pa. St. 389. But compare *contra*, Catlin v. Trustees etc. 62 Ind. 365.

3 See Lyon v. Strong, 6 Vt. 219; Smith v. Bean, 15 N. H. 577; Cransen v. Goss, 107 Mass. 439; Allen v. Gardiner, 7 R. I. 22; Northrup v. Foote, 14 Wend. 248; Murphy v. Simpson, 14 Mon. B. 419; Pate v. Wright, 30 Ind. 476; Mueller v. State, 76 Ind. 310; Sayre v. Wheeler, 32 Iowa, 559; Finley v. Quirk, 9 Minn. 194; 86 Am. Dec. 93; Story on Sales, §§ 500-502.

4 2 Schouler on Personal Property, § 625, whence preceding paragraph also derived.

5 Where a Sunday contract is fully executed, the law leaves the parties where it finds them: Meyers v. Meinrath, 101 Mass. 336; Green v. Godfrey, 44 Me. 25; Thompson v. Williams, 58 N. H. 248. Compare, as to replevin, Kinney v. McDermott, 55 Iowa, 674.

6 The contract is not illegal where the price is agreed upon on Sunday, but delivery was not to take place till the next day: Rosenblatt v. Tounsley, 73 Mo. 536.

7 2 Schouler on Personal Property, § 625; citing, Simpson v. Nicholls, 5 Mees. & W. 702; Harrison v. Colton, 31 Iowa, 16; Dickinson v. Richmond, 97 Mass. 45; Sumner v. Jones, 24 Vt. 317; Cameron v. Peck, 37 Conn. 555; Winchell v. Carey, 115 Mass. 560; Sayles v. Wellman, 10 R. I. 465; Vinton v. Peck, 14 Mich. 287; Story on Sales, §§ 500-502.



## CHAPTER XXXII.

## MISTAKE.

- § 377. Concerning terms of contract.
- § 378. Touching essence of contract.
- § 379. As to subject-matter.
- § 380. Concerning identity of article.
- § 381. Concerning price.
- § 382. Concerning quantity.
- § 383. Concerning quality.
- § 384. Concerning person.
- § 385. Remedies of parties.

§ 377. Concerning terms of contract.—*No meeting of minds.* When the minds of the parties to a contract do not meet upon the whole and exact terms of such contract, the same is void.<sup>1</sup> Hence, where there is a mutual mistake as to the price of an article, there is no sale, and neither party is bound.<sup>2</sup>

*Different ships meant.* And to an action for not accepting cotton “to arrive ex Peerless from Bombay,” it is a good defense that the buyer meant a ship called the Peerless, which sailed from Bombay in October, and that the seller was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the Peerless, which sailed from Bombay in December.<sup>3</sup>

*Part delivery.* So whatever is done between the parties, under a supposed agreement of sale, when there is a mutual misunderstanding as to its terms, is not binding;<sup>4</sup> and though both parties consent at the time to the delivery of a portion of the property agreed to be sold, each supposing that such delivery is to be a part performance of the conditional contract of sale, the law will not imply that either of the parties intended

that the property was to be absolutely the purchaser's in case he failed to comply with the whole agreement.<sup>5</sup>

*Mistake of one party.* But a mistake of one party cannot be set up by him as a ground for rescinding a sale or other contract,<sup>6</sup> or for resisting its enforcement, when his manifested intention misleads the other party,<sup>7</sup> except where advantage is taken of an obvious blunder.<sup>8</sup>

1 Fullerton v. Dalton, 58 Barb. 236, 239. And see Ketchum v. Catlin, 21 Vt. 191, 194; Greene v. Bateman, 2 Wood. & M. 359, 361; Cutts v. Guild, 57 N. Y. 229, 234.

2 Rupley v. Daggett, 74 Ill. 351, 353. And see Harran v. Foley, 62 Wis. 584, 588; Rovegno v. Defferari, 40 Cal. 459, 462; § 381, on MISTAKE CONCERNING PRICE.

3 Raffles v. Wichelhaus, 2 Hurl. & C. 906.

4 Fullerton v. Dalton, 58 Barb. 237, 239.

5 Fullerton v. Dalton, 58 Barb. 237, 239.

6 See Harran v. Foley, 62 Wis. 584, 586.

7 See Phillip v. Gallant, 62 N. Y. 256, 268; Zuchtman v. Roberts, 109 Mass. 53, 55; Thomas v. Brown, Law R. 7 Q. B. D. 714, 722.

8 Harran v. Foley, 62 Wis. 584, 586. And see Stoddard v. Ham, 129 Mass. 383, 385; 37 Am. Rep. 369; Webster v. Cecil, 30 Beav. 62; Tamplin v. James, Law R. 15 Ch. D. 221.

§ 378. *Touching essence of contract. False representation.* If a purchaser buys on the faith of a false representation by the seller, touching the essence of the contract, the sale will be set aside in equity,<sup>1</sup> whether the misrepresentation was the result of fraud or of mistake.<sup>2</sup>

*Substantial failure of consideration.* But an innocent misrepresentation or misapprehension does not authorize a rescission of the contract, unless it is such as to show that there is a complete difference in substance between the thing supposed to be taken and that actually taken, so as to constitute a failure of consideration.<sup>3</sup>

*Matter merely collateral.* And though a mutual mistake of the parties as to the subject-matter of the contract, or the price or terms, may be interposed as a defense,<sup>4</sup> it is otherwise where the mistake is in relation

to a fact wholly collateral, and not affecting the essence of the contract itself.<sup>5</sup>

1 *Doggett v. Emerson*, 3 Story, 700, 733.

2 *Doggett v. Emerson*, 3 Story, 700, 733. And see *Torrance v. Bolton*, Law R. 8 Ch. App. 118, 123; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 449, 453; *Miles v. Stevens*, 3 Pa. St. 21; 45 Am. Dec. 621, 624.

3 *Kennedy v. Panama Mail Co.* Law R. 2 Q. B. 580, 587. Failure of consideration: §§ 386-390.

4 See §§ 379-382, on SUBJECT-MATTER, IDENTITY OF ARTICLE, PRICE, etc.

5 *Wheat v. Cross*, 31 Md. 99, 104; 1 Am. Rep. 28, 30.

§ 379. *As to subject-matter.*—*As avoiding contract.* A contract which is made while the parties are under a mutual mistake as to material facts affecting the subject-matter is invalid,<sup>1</sup> and may be avoided in a court of law as well as in equity.<sup>2</sup>

*Identity or existence of thing sold.* Thus, where in a negotiation for the sale of property, the seller has reference to one article and the buyer to another,<sup>3</sup> or where the parties supposed the property to be in existence, when in fact it had been destroyed,<sup>4</sup> the contract is ineffectual because the parties did not in fact agree as to the subject-matter, or because it had no existence.<sup>5</sup>

*Situation of property.* And when it is discovered that the parties, in making a contract of sale, had proceeded upon a mutual mistake as to the situation, the contract is invalid, the parties may be remitted to their original rights, and any portion of the price paid may be recovered back by the purchaser.<sup>6</sup>

*Buyer's ability to pay.* But when the mistake does not concern the article sold, or the identity of the person purchasing, but the ability of the purchaser to pay for the goods, such mistake will invalidate the contract of sale and furnish ground for relief in equity.<sup>7</sup>

*Quality.* And a mere mistake as to the quality of specified goods will not invalidate the contract of sale.<sup>8</sup>

- 1 Ketchum v. Catlin, 21 Vt. 191, 194.
- 2 Ketchum v. Catlin, 21 Vt. 191, 194. And see Flight v. Booth, 1 Bing. N. C. 370; Mowatt v. Wright, 1 Wend. 355, 362; 19 Am. Dec. 508.
- 3 See Harvey v. Harris, 112 Mass. 32, 37.
- 4 See Thompson v. Gould, 20 Pick. 134, 139.
- 5 Gardner v. Lane, 9 Allen, 492, 499; 85 Am. Dec. 779. And see Rice v. Dwight Manuf. Co. 2 Cush. 80, 86; Ketchum v. Bank of Commerce, 19 N. Y. 499, 502; Allen v. Hammond, 11 Peters, 63, 71, 72.
- 6 Ketchum v. Catlin, 21 Vt. 191, 195. And see Mowatt v. Wright, 1 Wend. 355; 19 Am. Dec. 508.
- 7 Lupin v. Marie, 6 Wend. 77; 21 Am. Dec. 256, 258.
- 8 Wheat v. Cross, 31 Md. 99, 104; 1 Am. Rep. 28, 30; Gardner v. Lane, 9 Allen, 492, 500; 85 Am. Dec. 779. See § 383.

§ 380. Concerning identity of article.—*Reference to different articles.* If there is a mistake as to the identity of the article sold, and not merely as to its quality, such as occurs where the seller and buyer have reference to different articles,<sup>1</sup> the contract which the parties intended to make fails of effect, and the title does not pass, because the parties did not in fact agree as to the subject-matter.<sup>2</sup>

*Misplacement of damaged flour.* Thus, where the highest bidder for the second-class flour at a sale of flour, part disposed of as slightly damaged and part as considerably damaged, selected as the flour he would take two rows of flour of the first class, which had been accidentally misplaced without the knowledge of the owner or auctioneer, the same being outside the auction-room, it was held that the minds of the parties had not met so as to make a sale.<sup>3</sup>

*Contents of receptacle.* And where a party purchased at an administrator's sale a drill machine, which unknown to all parties, contained money and other valuables secreted there by the decedent, it was held that the sale passed to the purchaser the right to the machine, and to every constituent part of it, but not to the valuables contained in it.<sup>4</sup> So the purchaser of a safe at an execution sale acquires no title to its contents.<sup>5</sup>

1 See citations in next note.

2 *Harvey v. Harris*, 112 Mass. 32, 37. And see *Gardner v. Lane*, 9 Allen, 492, 499; 85 Am. Dec. 779; *Rice v. Dwight Manuf. Co.* 2 Cush. 80, 86; *Chapman v. Cole*, 12 Gray, 141, 142; *Sheldon v. Capron*, 3 R. I. 171; *Thornton v. Kempster*, 5 Taunt. 786, 788; *Fullerton v. Dalton*, 58 Barb. 236.

3 *Harvey v. Harris*, 112 Mass. 32. Compare *Hills v. Snell*, 104 Mass. 173; *Fear v. Jones*, 6 Iowa, 163, 173.

4 *Hutmacher v. Harris*, 38 Pa. St. 491, 498, 499. Such valuables on discovery were declared to be held as treasure-trove for the representatives of the deceased owner: *Hutmacher v. Harris*, 38 Pa. St. 491, 498, 499.

5 *Ray v. Light*, 34 Ark. 421, 427. But it is his duty to preserve them and restore them to the owner when called for: *Ray v. Light*, 34 Ark. 421, 427.

### § 381. Concerning price. — *Effect of mistake concerning.*

It is an elementary principle that where there is a mutual mistake as to the price of an article,<sup>1</sup> there is no sale, and neither party is bound,<sup>2</sup> since there has been no meeting of the minds of the contracting parties.<sup>3</sup>

*Vendor's subsequent sale.* And where there is a mutual misunderstanding between the parties, as to the amount of the consideration to be paid on a supposed contract of sale, of an interest in a copartnership, a subsequent sale by the apparent vendor to a third party is valid.<sup>4</sup>

*Snapping up offer.* So if personal property is by mistake, as through a slip of the tongue, offered for sale at a lower price than was intended, and the offer is accepted by one who knows or has reason to believe that it was a mistake, there is no sale which is binding upon the vendor.<sup>5</sup>

1 Mistake concerning price: See, also, *Wilkinson v. Williamson*, 76 Ala. 163, 168.

2 See citations in next note.

3 *Rupley v. Daggett*, 74 Ill. 351, 353. And see *Rovegno v. Defferari*, 40 Cal. 459, 462; *Greene v. Bateman*, 2 Wood. & M. 359, 361; *Calkins v. Griswold*, 11 Hun, 208, 212, 213; *Harran v. Foley*, 62 Wis. 548; 22 N. W. Rep. 837; *Phillips v. Bistolli*, 2 Barn. & C. 511. Compare *Star Glass Co. v. Longley*, 64 Ga. 575, 578; *Fear v. Jones*, 6 Iowa, 169, 170.

4 *Rovegno v. Defferari*, 40 Cal. 459, 462.

5 *Harran v. Foley*, 62 Wis. 584; 22 N. W. Rep. 837. And see *Webster v. Cecil*, 30 Beav. 62; *Tamplin v. James*, Law R. 15 Ch. D. 221.

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§ 382. **Concerning quantity.**—*Recovery of excess of price paid.* In sales of goods, a mutual mistake on such a material point<sup>1</sup> as the quantity of goods sold, will entitle the buyer to recover back any excess of price which he may have paid under the misapprehension.<sup>2</sup>

*Setting off amount of shortage.* And a person buying milk, who pays for the same, counting each can as containing eight gallons, and supposing the cans to hold that much, when in fact they do not, may set off the money paid by him for the shortage out of any sum he may owe the seller, in a suit for the price.<sup>3</sup>

*Duties not recoverable.* But though the vendor may recover the excess paid by him where there has been a mutual mistake as to the mode of measurement, and the quantity delivered was supposed to be greater than it really was,<sup>4</sup> or may compel the seller to make good the deficiency, he cannot recover remote damages resulting from the deficiency, such as excessive duties on the chattels, paid while laboring under the mistake.<sup>5</sup>

1 See § 378, on MISTAKE TOUCHING ESSENCE OF CONTRACT.

2 *Scott v. Warner*, 2 Lans. 49. And see *Wheaton v. Olds*, 20 Wend. 174; *Cox v. Prentice*, 3 Maule & S. 344; *Caulkins v. Griswold*, 11 Hun, 208, 211, 213; *Armstrong Furniture Co. v. Kosure*, 63 Ind. 545, 546. But compare *Newlan v. Dunham*, 60 Ill. 233, 235. Excessive delivery: *Bours v. Watson*, 1 Mill. Const. 393; *Smith v. Mayo*, 1 Allen, 160. And see *Goodman v. Wells*, 49 Ala. 309.

3 *Devine v. Edwards*, 101 Ill. 130, 140.

4 See citations in first subdivision of section.

5 *Hargous v. Ablon*, 3 Denio, 406; 45 Am. Dec. 481, 483. And see *Blanchard v. Ely*, 21 Wend. 342, 347; 34 Am. Dec. 250, 254; *Voorhies v. Earl*, 2 Hill, 288; 38 Am. Dec. 588, 589.

§ 383. **Mistake concerning quality.**—*Not ground of avoidance by buyer.* It is where there is a mutual mistake as to identity of the thing sold, or as to price and terms, etc., that the defense of mistake is allowed.<sup>1</sup> And a buyer cannot avoid a contract on the ground of mistake of fact, by showing that he was mistaken as to the

quality of the thing sold;<sup>2</sup> but in the absence of a warranty, the rule of *caveat emptor* applies to mistakes of this kind.<sup>3</sup>

*No repudiation by seller of ascertained articles.* So a mutual mistake or misapprehension as to the quality of particular articles, whose kind or description has been ascertained, will not enable the vendor to repudiate the sale.<sup>4</sup>

1 *Wheat v. Cross*, 31 Md. 99, 104; 1 Am. Rep. 28, 30. And see *Fullerton v. Dalton*, 53 Barb. 236, 239; *Ketchum v. Catlin*, 21 Vt. 191, 194.

2 *Wheat v. Cross*, 31 Md. 99, 104; 1 Am. Rep. 28, 30. But compare *Gardner v. Lane*, 9 Allen, 492, 500.

3 *Wheat v. Cross*, 31 Md. 99, 104; 1 Am. Rep. 28, 30.

4 See *Harvey v. Harris*, 112 Mass. 32, 37; *Gardner v. Lane*, 9 Allen, 492, 499, 500. Sale by wrong sample: *Scott v. Littledale*, 8 El. & B. 813; *Megaw v. Molloy*, 2 Law R. Ir. 530.

§ 384. *Concerning person.*—*Vital when personality important.* A mistake in regard to the person dealt with, as where the successor in business fills an order given to his predecessor, is so material as to render the sale invalid for want of privity between the parties,<sup>1</sup> when the personality of the party with whom the negotiations are conducted<sup>2</sup> is an important factor of the transaction.<sup>3</sup>

*Exclusion from set-off, etc.* But where through the mistake of a broker, goods are described in the memorandum of sale as bought of a firm which has been dissolved, the purchaser of the goods cannot avoid the contract, particularly after treating it as subsisting, unless through such mistake he had been induced to think he was dealing with one set of men rather than another,<sup>4</sup> and had been prejudiced or excluded from a set-off.<sup>5</sup>

*Assent to purchase from successor.* So one who buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is deal-

ing with his debtor, but makes no objection, and still retains the goods, though he is informed before leaving that another person has become the owner of the stock of goods there, and is selling them on his own account, cannot afterwards resist an action for the price,<sup>6</sup> although the seller acquired them by a conveyance that might have been avoided as fraudulent as against the creditors of the original owner.<sup>7</sup>

*Giving credit under mistaken assumption.* And the undisclosed fact that a party supposed that the commission merchant to whom he was selling the goods was the agent of another, and that the vendor would not have sold them to such buyer on his own credit, does not make the case one of mistaken identity,<sup>8</sup> so as to enable such seller to recover in conversion against the assumed principal, who had bought the goods from the first purchaser.<sup>9</sup>

1 See citations in succeeding notes.

2 See *Johnson v. Raylton*, Law R. 7 Q. B. D. 438.

3 See *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9; *Boulton v. Jones*, 2 Hurl. & N. 564. Remedies in special cases: *Hills v. Snell*, 104 Mass. 173; *Dalton v. Hamilton*, 1 Hann. 422, 425, 426.

4 *Mitchell v. Lapage*, Holt N. P. 253.

5 *Mitchell v. Lapage*, Holt N. P. 253. But compare *Boston Ice Co. v. Potter*, 123 Mass. 28, 31; 25 Am. Rep. 9.

6 *Mudge v. Oliver*, 1 Allen, 74. Compare *Orcutt v. Nelson*, 1 Gray, 526, 542.

7 *Mudge v. Oliver*, 1 Allen, 74.

8 See § 359, on FRAUD ON SELLER.

9 *Stoddard v. Ham*, 129 Mass. 383, 385; 37 Am. Rep. 369. Compare *Ex parte Barnett*, Law R. 3 Ch. D. 123.

§ 385. Remedies of parties.—*Recovering back price.* Purchasers of goods, in cases of mistake, may recover back the price, or any portion thereof which they have paid, where the thing sold has ceased to exist,<sup>1</sup> or is deficient in quantity or weight,<sup>2</sup> or there has been an excessive charge therefor.<sup>3</sup>

*Refusal to deliver.* But the seller of animals cannot



refuse to deliver them because the prices had advanced instead of declining as the seller had represented in reliance upon a newspaper report.<sup>4</sup>

*Where mistake as to subject-matter.* The determination of the existence or non-existence of a contract, which has been entered into under a mistake as to the subject-matter, may be made in a court of law, in the exercise of its powers as such.<sup>5</sup> And a contract whereby a county assigned its swamp-land interests will be set aside when made under a material mistake of facts as to their extent.<sup>6</sup>

*Reforming bill of sale.* So a bill of sale of personal property is properly reformed on the ground that by mistake of the seller's secretary, who drew the document, it had been made to include articles which did not belong to the seller, and which were not in fact included in the agreement of sale between the parties, and that otherwise the unpaid price notes could not be enforced.<sup>7</sup>

1 See § 379, on MISTAKE AS TO SUBJECT-MATTER.

2 See § 382, on MISTAKE CONCERNING QUANTITY.

3 See *Strickland v. Turner*, 7 Ex. 208; *Cox v. Prentice*, 3 Maule & S. 344; *Calkins v. Griswold*, 11 Hun, 203, 211, 213; *Scott v. Warner*, 4 Lans. 306; *Holtz v. Schmidt*, 59 N. Y. 253, 257.

4 *Bird v. Forceman*, 62 Ill. 212.

5 *Carey v. Gunnison*, 22 N. W. Rep. 934, 935, 936. Mistake of fact in description in bill of sale not relievable at law: *Lampson v. Cummings*, 52 Wis. 491, 496. Defense to price note that mistake in supposing goods not fit for use: *Byers v. Chapin*, 28 Ohio St. 300.

6 *Montgomery County v. American Emigrant Co.* 47 Iowa, 91, 96.

7 *Menomonee Co. v. Langworthy*, 18 Wis. 444, 446. Compare *McCloskey v. McCormick*, 44 Ill. 336.

## CHAPTER XXXIII.

### FAILURE OF CONSIDERATION

- § 386. What constitutes.
- § 387. Worthlessness of article.
- § 388. Valueless obligation.
- § 389. Partial failure of consideration.
- § 390. Remedy for such failure.

§ 386. **What constitutes.**—*In general.* There is a want or failure of consideration where only part of the property bargained for under an entire contract is delivered ;<sup>1</sup> or when an article delivered to the purchaser with a reservation of title is destroyed without fault on his part ;<sup>2</sup> or when chattels delivered under a conditional sale are retaken and resold, as stipulated, for default in payment ;<sup>3</sup> or where a patent is incapable of being applied to any practical or beneficial purpose.<sup>4</sup>

*Failure of title and existence of defects.* There is likewise a want or failure of consideration so far as the objection to an article may arise from any matter which is at the risk of the seller, such as a breach of his implied warranty of title,<sup>5</sup> but not if it arises from a matter which is at the risk of the buyer, such as defects or unsoundness,<sup>6</sup> even, as it is sometimes held, if thereby the article is rendered worthless.<sup>7</sup> And where a party sold certain goods to another, taking in payment the standing wood on a farm held by the buyer, and the amount of such wood brought to market only paid for the expense of cutting and hauling it, and the trade was made pending equity proceedings which involved the title to the farm, and which resulted adversely to the buyer, it was held that there was a total failure of consideration for the goods sold, and that action would lie for their value.<sup>8</sup>

- 1 *Giles v. Edwards*, 7 Term Rep. 181, 182.
- 2 *Cobb v. Tuffts*, 2 Tex. App. (Civ. Cas.) § 154.
- 3 *Minneapolis Harvester Works v. Holly*, 27 Minn. 495.
- 4 *Green v. Stuart*, 7 Baxt. 418, 421. And see *Nash v. Hull*, 102 Mass. 139; 3 Am. Rep. 435, 437; *Harlow v. Putnam*, 124 Mass. 553, 556. Compare *Cowan v. Dodd*, 3 Cold. 278, 282, 283. Or if no patent had ever issued: *Shepherd v. Jenkins*, 73 Mo. 510, 513. But compare *Begbie v. The Phosphate Sewage Co.* Law R. 1 Q. B. D. 679; affirming same case, Law R. 10 Q. B. 491.
- 5 See *Elchholz v. Banister*, 17 Com. B. N. S. 708; *Brown v. Cockburn*, 37 Up. Can. Q. B. 532, 604, 605; *Matheny v. Mason*, 73 Mo. 677; 3 Am. Rep. 541, 544, 545; *Trevine v. Hein*, 2 Tex. App. (Civ. Cas.) § 105. Evidence of failure of title: *Sanborn v. Jackman*, 50 N. H. 169.
- 6 *Bryant v. Pember*, 45 Vt. 487, 491. And see *Brewer v. Christian*, 9 Ill. App. 57, 61; *Eagan v. Call*, 34 Pa. St. 226, 238; *Drew v. Roe*, 41 Conn. 41, 50; *Smalley v. Hendrickson*, 29 N. J. L. 371, 374; *Reed v. Prentiss*, 1 N. H. 174, 176.
- 7 *Bryant v. Pember*, 45 Vt. 487, 491. But see § 387, on WORTHLESSNESS OF ARTICLE.
- 8 *Peckham v. Peckham*, 13 R. I. 354, 355.

§ 387. *Worthlessness of article.*—*Insufficient defect of quality.* It is the doctrine of some of the cases that in the absence of fraud or warranty in the sale of personal property, it is no ground for setting up failure of consideration that the article proves so defective in quality as to be worthless.<sup>1</sup>

*Difference not in quality, but in substance.* But the distinction has been made that when the thing sold differs, not merely in quality, but in substance, from what the purchaser was led by the vendor to believe he was buying, and the difference in subject-matter is so substantial and essential as to amount to a failure of consideration, there is no contract, and the purchaser may recover back the money paid.<sup>2</sup>

*Return of article, and notice of worthlessness.* And some of the cases, under the force of statutory regulation, go so far as to hold that if an article is worthless for the purpose for which it was purchased, this may be shown as a valid defense in an action for the price, as evincing an entire failure of consideration,<sup>3</sup> although

there was no return of the article made or offered, and no notice given of its worthlessness.<sup>4</sup>

*Getting thing bargained for.* Yet it is an established rule, according to various authorities, that where a party gets all he knowingly contracted for, he cannot say that he got no consideration, or that the consideration has failed, although the article turns out to be of no value.<sup>5</sup>

*Development of latent defect.* Hence, where the buyer received what he agreed to purchase, and what the seller intended to dispose of, namely, an apparently merchantable article, it is declared that there cannot properly be an entire failure of consideration because the article proves worthless, through the development of a latent defect.<sup>6</sup>

*Entire want of value to either party.* And what is meant by a failure of consideration is said to be not simply that the article is worthless to the purchaser, but that it is of no value to either party.<sup>7</sup>

1 See *Bryant v. Pember*, 45 Vt. 487, 490; *Deiffendorff v. Gage*, 7 Barb. 18, 20; *Hardesty v. Smith*, 3 Md. 39, 42; *Mason v. Chappell*, 15 Gratt. 527, 528.

2 *Webb v. Odell*, 49 N. Y. 583, 585.

3 *Compton v. Parsons*, 76 Mo. 455, 457; *contra*, *Mason v. Chappell*, 15 Gratt. 572, 588.

4 *Compton v. Parsons*, 76 Mo. 455, 457. And see *Murphy v. Gay*, 37 Mo. 535.

5 See *Hardesty v. Smith*, 3 Ind. 39, 44; *Baker v. Roberts*, 14 Ind. 552, 553; *Smock v. Pierson*, 63 Ind. 405, 409; *Niedefer v. Chastain*, 78 Ind. 363, 368; *Clark v. Peabody*, 22 Me. 500, 502; *Bryant v. Pember*, 45 Vt. 487, 491; *Drew v. Roe*, 41 Conn. 41, 50; *Johnston v. Smith*, 86 N. C. 499, 502; *Lambert v. Heath*, 15 Mees. & W. 486, 487; *Lawes v. Pursch*, 6 El. & B. 930, 936.

6 *Drew v. Roe*, 41 Conn. 41, 50.

7 *Johnston v. Smith*, 86 N. C. 499, 502. And see *Hart v. Wright*, 18 Wend. 449, 454.

§ 388. **Valueless obligation.**—*Liability for sale of.* It is a general rule of law that where a party sells an obligation which turns out to be valueless, and not of such

a character as he represented it to be, he is liable to the vendee as upon a failure of consideration.<sup>1</sup>

*Illustrative instances.* And usually, though not always solely, upon the express or tacit ground of failure of consideration, recovery has been permitted of money paid for forged scrip in a railway company,<sup>2</sup> and for shares in a joint stock company which was never formed;<sup>3</sup> and for a certificate for a scrip dividend of a gas company, which was adjudged void;<sup>4</sup> and for void city bonds, without a return or offer of return;<sup>5</sup> and for forged bills or notes;<sup>6</sup> and for a bill of exchange which turned out to be invalid and worthless because of a material alteration,<sup>7</sup> or lack of a stamp;<sup>8</sup> and for a note made by a party who turned out to have been insane at the time of signing;<sup>9</sup> and for accommodation notes sold for less than their face, and represented to be business paper.<sup>10</sup>

1 See *Paul v. The City of Kenosha*, 22 Wis. 266, 272.

2 *Wetstropp v. Solomon*, 8 Com. B. 345.

3 *Kempson v. Sanders*, 4 Bing. 5.

4 *Wood v. Sheldon*, 42 N. J. L. 421. And for school land certificates which were held invalid, see *Hurd v. Hall*, 12 Wis. 112, 136.

5 *Paul v. The City of Kenosha*, 22 Wis. 266. But compare *Christy v. Sullivan*, 50 Cal. 337; 19 Am. Rep. 755.

6 *Merriam v. Wolcott*, 3 Allen, 258, 259; *Terry v. Bissell*, 26 Conn. 421, 30; *Aldrich v. Jackson*, 5 R. I. 218, 219. And see *Whitney v. Nat. Bank*, 45 N. Y. 303.

7 *Burchfield v. Moore*, 3 El. & B. 683.

8 *Gompertz v. Bartlett*, 2 El. & B. 849.

9 *Thrall v. Newell*, 19 Vt. 208.

10 *Webb v. Odell*, 49 N. Y. 533, 535. But compare *Littauer v. Goldman*, 72 N. Y. 506, 509; disapproved, *Woods v. Sheldon*, 42 N. J. L. 421, 424, 425. It is not a failure of consideration of a check given for the price of a note bought at a discount, that the makers have stopped payment, without proof that the note was entirely worthless; *Elwell v. Chamberlain*, 4 Bosw. 320, 333. And compare *Johnson v. Barney*, 1 Iowa, 531, 539, 540.

§ 389. *Partial failure of consideration.*—*When occurs.* There is a partial failure of consideration where only part of a stipulated quantity of goods is delivered,<sup>1</sup> or

where through the seller's fault no dividend is received on an interest in a land association,<sup>2</sup> or where there is a collection of part of judgments transferred for a note.<sup>3</sup>

*Change in mail route.* But there is no partial failure of consideration for a promissory note given for the assignment of a government mail route, because, as the existing law permitted, there has been a cutting down of the mail route and a reduction of payment thereon.<sup>4</sup>

*Goods of inferior quality.* And it has been declared that though the vendor may sometimes be entitled to show the inferior quality of the goods as a proof of a partial failure of consideration,<sup>5</sup> yet he is liable for whatever is the real value of the goods, if he neither returns them within a reasonable time, nor offers to do so.<sup>6</sup>

1 Devaux v. Connolly, 8 Com. B. 640, 667, 668. But compare Richards v. Shaw, 67 Ill. 222, 224; Avery v. Wilson, 81 N. Y. 341, 344.

2 Purkett v. Gregory, 2 Scam. 44, 45.

3 Harper v. Columbus Factory, 35 Ark. 127, 131. And it may be shown that the seller failed to perform part of the consideration for an order for a machine, namely, that he should furnish a man to set it up, and make it work as prescribed: Wood Mowing etc. Co. v. Gartner, 21 N. W. Rep. 885.

4 Wells v. Carr, 8 West C. Rep. 127.

5 See next section hereof.

6 Bischof v. Lucas, 6 Ind. 26.

§ 390. **Remedy for such failure.**—*Defense to suit for price.* Although there is still a conflict in the cases on the subject, yet it appears to be the prevailing modern doctrine, at least in this country, that what is denominated partial failure of consideration may be given in evidence in mitigation of damages, even in a suit on a price note.<sup>1</sup> And in various States, such defense is allowed by statute,<sup>2</sup> and in cases of warranty.<sup>3</sup>

*Separate suit or counter-claim.* But in other States, a partial failure of consideration can be remedied only by a distinct action, or sometimes by a counter-claim.<sup>4</sup>

*Delivery of part under entire contract.* Where there is a delivery of part only under an agreement to sell all the cord-wood at a certain place, the buyers may recover back the money they had paid under this entire contract, on the ground that the consideration had failed.<sup>5</sup>

*Several chattels sold together.* But if several chattels are sold together for one gross sum, though this constitutes an entire contract,<sup>6</sup> yet if the vendee retains such as were delivered, he cannot recover back any portion of the money paid by him, upon the ground of failure of consideration.<sup>7</sup>

1 Withers *v.* Greene, 9 How. 213, 230, and cases reviewed. And see Andrews *v.* Wheaton, 22 Conn. 112, 118; Nations *v.* Thomas, 25 Tex. Supp. 221, 223; Staab *v.* Garca Y Ortez, 1 Pacif. Rep. (N. M.) 857. Upon a plea of total failure of consideration, evidence of partial failure, but not of an attempted rescission based thereon, is admissible in reduction of damages *pro tanto*: Manuf. Co. *v.* Lewis, 30 Kan. 541; 1 Pacif. Rep. 812.

2 Nichols *v.* Hunton, 45 N. H. 470; Schuchmann *v.* Knoebel, 27 Ill. 175, 178.

3 Wright *v.* Findley, 21 Ga. 59; Beall *v.* Pearre, 12 Md. 550.

4 Johnson *v.* Smith, 86 N. C. 498, 501. And see Henderson *v.* Ward, 27 Vt. 432, 434, 435; Burton *v.* Schermerhorn, 21 Vt. 289, 291.

5 Giles *v.* Edwards, 7 Term Rep. 181, 182.

6 Miner *v.* Bradley, 22 Pick. 457, 459. And see Young etc. Manuf. Co. *v.* Wakefield, 121 Mass. 91, 92, 93; Norris *v.* Harris, 15 Cal. 226, 256.

7 Miner *v.* Bradley, 22 Pick. 457, 459. Compare Chanter *v.* Leese, 5 Mees. & W. 698, 701, 702.

## CHAPTER XXXIV.

### SELLER'S REMEDIES.

- § 391. In general.
- § 392. Damages for non-acceptance.
- § 393. Notice not to manufacture.
- § 394. Forms of action.
- § 395. Waiting for expiration of credit.
- § 396. Remedies against the goods.

§ 391. *In general.*—*Against buyer and against goods.* The seller's remedies are ordinarily stated to be of two kinds: *First*, by personal action against the buyer; *second*, by proceedings against the goods.<sup>1</sup>

*Action for goods sold.* Where an actual delivery has taken place, the remedy of the seller by personal action against the buyer, who fails to pay for them as agreed, is a suit for goods sold and delivered.<sup>2</sup> But where the seller still retains possession of the goods, but is ready to deliver them, on payment, the seller's remedy against the defaulting buyer is a suit for goods bargained and sold.<sup>3</sup>

*Damages for failure to accept.* And the buyer should be sued specially for damages for not accepting the goods, where the title therein has not passed to the buyer, and the seller still retains the possession of the goods.<sup>4</sup>

*Resale, etc.* Furthermore, the seller who is ready to deliver may, according to many of the American cases, have the choice of three remedies: *First*, to treat the property as his own, and sue for damages, in cases where he has not parted with the title; *second*, to treat the property as that of the buyer, and sue for the price, in cases where he has parted with the title; *third*, to



treat the property as that of the buyer, resell it for him, and sue for the difference between the contract price and that obtained on resale.<sup>5</sup>

*Seller's lien and stoppage in transitu.* Where the title has passed, and the seller retains possession of the goods, he has a lien upon them for the unpaid price;<sup>6</sup> while if he has delivered the goods to a carrier or other intermediate agent, he may stop them in transit, in case of the buyer's insolvency, before they reach his hands.<sup>7</sup>

1 2 Schouler on Personal Property, § 511. Proceedings against goods: See *Fetter v. Field*, 1 La. An. 80, 84; *Huelst v. Reyns*, 1 Abb. Pr. N. S. 27, 29; *Goldsmith v. Bryant*, 26 Wis. 34. And consult subsequent chapters on RESALE, SELLER'S LIEN, and STOPPAGE IN TRANSITU.

2 See Story on Sales, § 433.

3 See *Frazier v. Simmons*, 139 Mass. 531, 535; *Morse v. Sherman*, 106 Mass. 430, 432; distinguishing, *Atwood v. Lucas*, 53 Me. 508; 89 Am. Dec. 713. And consult § 223, on SELLER'S CUSTODY.

4 See 2 Schouler on Personal Property, § 513; Story on Sales, § 533.

5 See 2 Corbin's Benjamin on Sales, § 1117, n. 1; Bennett's Benjamin on Sales, 788; 1 Sedgwick on Damages (7th ed.), 596, n. a; *Dunstan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426, 431; *Pittsburgh etc. Ry. Co. v. Heck*, 50 Ind. 303, 308. Right of resale: See *Hunter v. Wetsell*, 84 N. Y. 549, 555; *Van Horn v. Rucker*, 33 Mo. 391; 84 Am. Dec. 52.

6 See *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754. And consult subsequent chapter on SELLER'S LIEN.

7 See 2 Bouvier Law Dict. (14th ed.) 548. And consult subsequent chapter on STOPPAGE IN TRANSITU.

§ 392. **Damages for non-acceptance.**—*When only remedy.* Where the seller is prevented from performing an executory contract, a suit for damages for non-acceptances is his only remedy.<sup>1</sup>

*General rule.* And where the title to the goods has not passed, and the seller does not resort to a resale of the goods in his possession, he can in general recover,<sup>2</sup> not the full price of the goods, but only the damage he has sustained.<sup>3</sup> The rule constantly applied in the courts of Great Britain and the United States, holds the damages to which the buyer is entitled under these

circumstances to be, in general, the difference between the contract price and the market price of the goods at the time and place of breach.<sup>4</sup>

*Exceptional cases.* But there may be cases in which the property is wholly worthless in the hands of the seller, as where an article is specially manufactured to order for the purchaser, and there the whole price agreed to be paid should be recovered,<sup>5</sup> while even elements of special damage may be considered in the assessment of damages.<sup>6</sup>

1 See *Hosmer v. Wilson*, 7 Mich. 294, 303, 304; *Butler v. Butler*, 77 N. Y. 472; *Pittsburgh etc. Ry. Co. v. Heck*, 50 Ind. 303, 306; 2 Corbin's *Benjamin on Sales*, § 1117, n. 1, citing foregoing cases. And consult *Atkinson v. Bell*, 8 Barn. & C. 277; *Langdell's Cases on Sales*, 801, 805; *Allen v. Jarvis*, 20 Conn. 38, 50; *Moody v. Brown*, 34 Me. 107, 109. Compare *Collins v. Delaporte*, 115 Mass. 159, 162.

2 According to Bennett's *Benjamin on Sales*, § 758. And see 1 *Chitty on Contracts* (11th Am. ed.), 615.

3 See *Laird v. Pim*, 7 Mees. & W. 474, 478; *Rand v. White Mountains R. R. Co.* 40 N. H. 79, 86; 1 *Chitty on Contracts* (11th Am. ed.), 615, and cases in note *p.* But compare *Thorndike v. Locke*, 98 Mass. 340; *Pearson v. Mason*, 120 Mass. 53, 58; *Phillips v. Merritt*, 2 Up. Can. C. P. 513, 527; *Moore v. Logan*, 5 Up. Can. C. P. 294, 296.

4 See *Barrow v. Arnaud*, 8 Q. B. 604, 610; *Gordon v. Norris*, 49 N. H. 376, 385; *Haines v. Tucker*, 50 N. H. 307, 314; *Allen v. Jarvis*, 20 Conn. 38, 48; *Bement v. Smith*, 15 Wend. 493, 497; *McNaught v. Dodson*, 49 Ill. 446, 448; *Fell v. Muller*, 78 Ind. 507, 512; *Chapman v. Ingram*, 30 Wis. 290, 294; *Northup v. Cook*, 39 Mo. 208, 211; 2 *Schouler on Personal Property*, § 513, citing most of these cases in support of text. And consult generally, *Hadley v. Baxendale*, 9 Ex. 341, 354; *Hobbs v. London etc. R. R. Co.* Law R. 10 Q. B. 111, 117; *Olyphant v. St. Louis Ore etc. Co.* 28 Fed. Rep. 729.

5 See *Allen v. Jarvis*, 20 Conn. 38, 49; *Gordon v. Norris*, 49 N. H. 376, 383, 384; *Bement v. Smith*, 15 Wend. 493, 497.

6 See *Knowlton v. Oliver*, 28 Fed. Rep. 516.

§ 393. **Notice not to manufacture.** — *General doctrine.* It has been regarded as settled law that where there is a contract for the manufacture and delivery of goods at a definite future period, and before the time of performance arrives, the purchaser repudiates the contract and notifies the vendor that he will not accept the goods if manufactured, such refusal and notice is a breach of the contract, which excuses the vendor from manufacturing

the goods,<sup>1</sup> and furnishes him if he shows himself to have been ready, willing, and able to perform on his part, a good cause of action on which he may sue, if not at once, at least as soon as the period of performance fixed by the contract has elapsed.<sup>2</sup>

*Applications.* These principles have been applied to a contract for the manufacture and supply of railway chairs;<sup>3</sup> to a contract to take malt in specified monthly quantities;<sup>4</sup> to a contract to manufacture phosphate by a special process;<sup>5</sup> and to an order for a designated number of hoes to be manufactured and delivered within a certain time.<sup>6</sup>

1 Eckenrode v. Chemical Co. 51 Md. 51, 59.

2 Eckenrode v. Chemical Co. 55 Md. 51, 59. And see Cort v. Ambergate Ry. Co. 17 Q. B. 127, 148; Black v. Woodrow, 39 Md. 194, 216; Haines v. Tucker, 50 N. H. 307; Clement etc. Manuf. Co. v. Meserole, 107 Mass. 362. Consult, also, Bennett's Benjamin on Sales, § 760; Campbell on Sales, 336; Silkstone Coal Co. v. Joint Stock Coal Co. 35 L. T. N. S. 668; Hochster v. De La Tour, 2 El. & B. 678; 22 Law J. Q. B. 455; Frost v. Knight, Law R. 5 Ex. 322; Law R. 7 Ex. 111; Parker v. Pettit, 43 N. J. L. 512, 517.

3 Cort v. Ambergate Ry. Co. 17 Q. B. 127. See Black v. Woodrow, 39 Md. 196, 216.

4 Haines v. Tucker, 50 N. H. 307.

5 Eckenrode v. Chemical Co. 55 Md. 51.

6 Clement etc. Manuf. Co. v. Meserole, 107 Mass. 362. So on exchange of real estate (Smith v. Lewis, 24 Conn. 624; 26 Conn. 110); and on sale of grain (Hughes' Case, 4 Ct. of Cl. 64, 73); and on contract to furnish hay to government: Yates v. United States, 15 Ct. of Cl. 119, 125.

§ 394. *Forms of action.*—*Special declaration.* Where the property in the goods has not passed, the declaration must be special for non-acceptance;<sup>1</sup> and a special declaration may also be requisite where payment was to be wholly or in part by bill or note.<sup>2</sup>

*Common counts for goods sold.* But where the property has passed to the buyer, it is laid down that the seller may recover the price of the goods on the common counts for goods bargained and sold, or for goods sold and delivered, as the rule of damages and the proof

requisite to authorize recovery of the price is the same in each.<sup>3</sup> And it has been recently held that there may be a bargain and sale of goods, sufficient to transfer the title, and thus to support an action for goods bargained and sold, without any such delivery as will amount to a transfer of possession.<sup>4</sup>

*Election of remedies.* The doctrine that if one elects between two inconsistent remedies the right to pursue the other is forever lost, has been applied so as to hold that where the seller treats the sale as rescinded for fraud, and recovers in replevin for the goods, they cannot a year afterward sue again upon the contract.<sup>5</sup>

*Suit for price.* In an action on the common counts to recover the price of property sold and delivered, when the delivery is not denied and the price is fixed by the written contract, the plaintiff will be entitled to recover the value of the goods actually furnished, subject to deductions to be made therefrom to the extent of the damages sustained by defendant by reason of plaintiff's non-performance of all the conditions of the contract.<sup>6</sup>

1 See *Bailey v. Smith*, 43 N. H. 141, 143; *Gordon v. Norris*, 49 N. H. 376, 382; *Stearns v. Washburn*, 7 Gray, 187, 189; *Ganson v. Madigan*, 13 Wis. 67, 72. And consult 1 Chitty on Contracts (11th Am. ed.), 615, and cases in note *p*; Bennett's Benjamin on Sales, § 765; Story on Sales, § 433.

2 2 Schouler on Personal Property, § 527.

3 See Bennett's Benjamin on Sales, § 765. And consult 1 Chitty on Contracts (11th Am. ed.), 614, and note *n*; 2 Chitty on Contracts (11th Am. ed.), 1330; 1 Sedgwick on Damages (5th ed.), 312; Wood's Mayne on Damages, § 200; *Bailey v. Smith*, 43 N. H. 141, 143; *Thompson v. Alger*, 12 Met. 428, 443; *Nichols v. Morse*, 100 Mass. 523; *Morse v. Sherman*, 106 Mass. 430, 432. But compare *Gordon v. Norris*, 49 N. H. 376, 382, 383.

4 *Frazier v. Simmons*, 139 Mass. 531, 535. And see *Morse v. Sherman*, 106 Mass. 430, 432; distinguishing, *Atwood v. Lucas*, 53 Me. 508; 89 Am. Dec. 713. But compare *Messer v. Woodman*, 22 N. H. 172; 53 Am. Dec. 241, 243; *Newmarket Iron Foundry v. Harvey*, 23 N. H. 395, 406.

5 *Farwell v. Myers*, 26 N. W. Rep. (Mich.) 328, 329; citing, *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Mich. 276; *Dunks v. Fuller*, 32 Mich. 243; *Neild v. Burton*, 49 Mich. 53; 12 N. W. Rep. 906. Waiving tort and suing in assumpsit: See *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227, 228; *Jones v. Hoar*, 5 Pick. 285, 290. Compare *Kraus v. Thompson*, 30 Minn. 64; 44 Am. Rep. 182.

6 Gage v. Myers, 26 N. W. Rep. (Mich.) 522; citing, Begole v. McKenzie, 26 Mich. 470; Mitchell v. Scott, 41 Mich. 108; 1 N. W. Rep. 963; Moon v. Harder, 38 Mich. 566; McQueen v. Gamble, 33 Mich. 344; Hoagland v. Moore, 2 Blackf. 167; Dubois v. Delaware etc. Canal Co. 4 Wend. 235; Moulton v. Trask, 9 Met. 577. Like effect: Flanders v. Putney, 28 N. H. 353; citing, Britton v. Turner, 6 N. H. 451; Horn v. Batchelder, 41 N. H. 86. And see Coit v. Schwartz, 29 Kan. 344. Suit for price: Consult further, Moline Scale Co. v. Beed, 52 Iowa, 307; McAllister v. Safely, 65 Iowa, 719, 723; 20 The Reporter, 6, 7; Hosley v. Scott, 26 N. W. Rep. (Mich.) 659, 660; McLennan v. McDermid, 52 Mich. 468, 470; Bullock v. Finley, 28 Fed. Rep. 514, 515; Overstreet v. Gallaher, 42 Ark. 208; McBain v. Austin, 16 Wis. 87; 82 Am. Dec. 705; Cheney-Bigelow Wire Works v. Sorrell, 142 Mass. 442; 8 N. E. Rep. 332; Wineman v. Walters, 53 Mich. 470, 472; Compton v. Parsons, 76 Mo. 455, 457; Rodman v. Guilford, 112 Mass. 405, 406, 407.

§ 395. *Waiting for expiration of credit.*—*In general.* If the sale is not for cash, but credit is given for a definite period, either absolutely or by taking a negotiable security like a bill or note, the seller cannot ordinarily bring his action against the purchaser for the price of the goods, until the period of credit has expired, or until the note or bill has matured.<sup>1</sup>

*Refusal to give security.* But it is fully settled that where goods are sold upon credit, and the purchaser agrees, as part of the contract, to execute notes, payable at a future day, for the purchase price, the refusal of the purchaser to execute the notes according to the contract entitles the seller to maintain an action for such refusal, and the measure of damages is the full price of the goods sold.<sup>2</sup>

*Buyer's fraud.* Yet even if the vendee obtains possession of the goods fraudulently, or without giving the security agreed upon, this does not enable the vendor to sue for goods sold and delivered before the expiration of the term of credit, but his immediate remedy is by an action for breach of the special agreement, or in tort.<sup>3</sup>

*Retention of goods sent.* If, however, there is a partially executed contract for a sale on credit, and the vendee gives notice that he will not carry out, but yet retains the goods already sent, it has been held that the

vendor has the legal right to consider the contract as rescinded, and may at once bring action on the new contract resulting from the buyer's conduct, and recover on the common counts the value of the goods delivered.<sup>4</sup>

1 Story on Sales, § 434. And see *Magrath v. Tinning*, 6 Up. Can. Q. B. (O. S.) 484, 485; *Wakefield v. Gorrie*, 5 Up. Can. Q. B. 159, 163; *Silliman v. McLean*, 13 Up. Can. Q. B. 544, 545, 546; 2 Schouler on Personal Property, § 527; *Keller v. Strasburger*, 23 Hun, 625, 626.

2 *Carnahan v. Hughes*, 9 N. E. Rep. (Ind.) 79; citing, *Hays v. Weatherman*, 14 Ind. 341; *Clodtfeldter v. Hulett*, 72 Ind. 137, 140; *Barrow v. Mullin*, 21 Minn. 374; *Hanna v. Mills*, 21 Wend. 90; 2 Corbin's Benjamin, par. 1127. Compare Bennett's Benjamin on Sales, § 765; citing, 1 Chitty on Contracts (11th Am. ed.), 615, n. r, and cases; *Bass v. White*, 7 Lans. 171.

3 See *Kellogg v. Turpie*, 2 Ill. App. 55, 60-70, reviewing the authorities; Bennett's Benjamin on Sales, § 320, n. d, p. 335; § 433, n. h, p. 575; § 765, n. z, p. 872. And consult *Ferguson v. Carrington*, 9 Barn. & C. 59; *Strutt v. Smith*, 1 Crompt. M. & R. 312; *Sheriff v. McCoy*, 27 Up. Can. Q. B. 597, 601; *Auger v. Thompson*, 3 Ont. App. 19, 22, 23; *Dellone v. Hull*, 47 Md. 112, 115; *Moriarity v. Stofferan*, 89 Ill. 528, 529; *Bicknell v. Buck*, 58 Ind. 354. But see *contra*, *Dietz v. Sutcliff*, 80 Ky. 650; 15 The Reporter, 713; *Rice v. Andrews*, 33 Vt. 691, 694.

4 See *Bartholomew v. Marwick*, 15 Com. B. N. S. 711, 716; 33 Law J. Com. P. 145. But see *Wayne's Merthyr Steam Co. v. Morewood*, 47 Law J. Q. B. 746, 748, 749. Consult Bennett's Benjamin on Sales, § 765, whence paragraph derived.

### § 396. Remedies against the goods. — *Lien and stoppage.*

A suit for goods bargained and sold, is not the sole remedy of the seller for default in payment for goods remaining in his possession after the title thereto has passed to the buyer,<sup>1</sup> for the common law recognizes a lien of the seller upon the goods for their price, so long as he does not part with them;<sup>2</sup> and in aid or extension of this comes the right of stoppage *in transitu* given by the law to an unpaid vendor, where the goods have been put in transit for delivery to the buyer, so that they are in actual possession of neither party to the contract, and under which the seller may intercept the goods if he can, so as to prevent them from reaching the possession of an insolvent buyer.<sup>3</sup>

*Right of resale.* The right of resale of the goods is a

further privilege generally allowed to the vendor in this country.<sup>4</sup>

1 Right to such action: See *Frazier v. Simmons*, 139 Mass. 531, 535; § 394, on FORMS OF ACTION.

2 See *Clark v. Draper*, 19 N. H. 419, 421; *Parks v. Hall*, 2 Pick. 206, 212; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Barrett v. Pritchard*, 2 Pick. 512, 515; *White v. Welsh*, 33 Pa. St. 396, 420; *Haskins v. Warren*, 115 Mass. 514, 533; *Milliken v. Warren*, 57 Me. 46, 50; *Griffiths v. Perry*, 1 El. & E. 630; *McEwan v. Smith*, 2 H. L. Cas. 309, 323; *Dodsley v. Varley*, 12 Ad. & E. 632, 634; *Langdell's Cases on Sales*, 155. And consult further, subsequent chapter on SELLER'S LIEN.

3 See *Bennett's Benjamin on Sales*, § 766; 2 *Corbin's Benjamin on Sales*, § 1123; 2 *Bouvier Law Dict.* tit. Stoppage in Transitu; *Loeb v. Peters*, 62 Ala. 243; 35 Am. Rep. 17, 18; 2 *Kent Com.* 540; *Atkins v. Colby*, 20 N. H. 154, 155; *O'Brien v. Norris*, 16 Md. 122, 130; *Inslee v. Lane*, 57 N. H. 454, 457; *Hause v. Judson*, 4 Dana, 7; 29 Am. Dec. 377, 380.

4 See § 404, on RIGHT OF RESALE.

## CHAPTER XXXV.

### BUYER'S REMEDIES.

- § 397. In general.
- § 398. Damages for failure to deliver.
- § 399. Restrictions on recovery.
- § 400. Suit for failure to deliver.
- § 401. Where title in buyer.
- § 402. Delay in delivery.
- § 403. Divergence of goods from contract.

§ 397. In general.— *Leading grounds for.* There are three leading instances in which the buyer of chattels finds occasion to invoke his remedies under the sale contract: *First*, where the seller fails altogether to deliver; *second*, where delivery is made or tendered, but the thing is not, in kind or quality or quantity, what was bargained for; and *third*, where the delivery is unreasonably late.<sup>1</sup>

*Application of remedies.* The breach for which a remedy is sought may be of the principal contract for the transfer of property and delivery of possession, or of the collateral contract of warranty either of quality or of title;<sup>2</sup> and the remedies of the buyer may be invoked before obtaining possession of the goods, both in cases where the contract is executory only, and in cases where the property has passed, or they may be invoked after taking actual possession of the goods.<sup>3</sup>

*Avoidance of contract.* The buyer has also the right to avoid the contract for mistake, failure of consideration, fraud, or illegality.<sup>4</sup>

*Non-conformity to executory contract.* When the thing tendered under an executory contract differs as regards time, quality, amount, or kind, from what the buyer



agreed to receive, it may be declined and the breach treated as entire, or it may be accepted as so much on account of what the contractor agreed to do or render, and an action brought for the amount by which the performance falls short of the promise.<sup>5</sup>

*Liability for price.* The liability of the buyer to pay the price is extended to cover interest thereon from the date of delivery.<sup>6</sup> But it is said that a purchaser's liability to pay any part of the purchase price is canceled by the vendor's wrongful resale of the goods.<sup>7</sup>

1 2 Schouler on Personal Property, § 570. Divergence of thing from that bargained for: Hare on Contracts, § 537. Inferiority in quality: *Correio v. Lynch*, 65 Cal. 273. Deficiency in quantity: *Creighton v. Comstock*, 27 Ohio St. 548; as noted, 2 Schouler on Personal Property, § 590. When no right of action by buyer's assignee for rebate of part of purchase price: *McCall v. Frith*, 5 N. E. Rep. (N. Y.) 429. Buyer guilty of equal negligence with seller: *Woods v. Rocchi*, 32 La. An. 210, 214. Remedies based on subsequent transactions induced by sale: 2 Schouler on Personal Property, 593; referring to *Drysdall v. Smith*, 44 Mich. 119, 122. Waiver of any question growing out of the weighing of cattle by buyer's settlement and giving of price note: *Wood v. Dickinson*, 8 Pacif. Rep. (Kan.) 205.

2 Warranty: §§ 315-353. Warranty of title: §§ 321-330. Warranty of quality: §§ 331-333. Particular warranties: §§ 334-350. Remedies for breach of warranty, §§ 351-353.

3 Bennett's Benjamin on Sales, § 869, whence text of next paragraph also derived. Damages on breach of contract of sale of advertising space in newspapers: *Hubbard v. Rowell*, 51 Conn. 423, 426. Error in taking question of nominal damages from jury: *Potter v. Mellen*, 30 N. W. Rep. (Minn.) 438.

4 Mistake in general: §§ 277-385. Failure of consideration in general: §§ 386-390. When plea not proper: *Sterling Organ Co. v. House*, 25 W. Va. 64. Remedies on failure of title in whole or part: See *Tabor v. Harrimon*, 59 N. H. 226; *Webster v. Laws*, 89 N. C. 224, 228. Fraudulent sales: §§ 354-361. Illegal sales: §§ 362-376. Right to reclaim delivered goods for breach of condition of giving note for price: *Osborn v. Gantz*, 60 N. Y. 540; stated, *Biddle on Chattel Warranties*, § 273.

5 Hare on Contracts, § 537; citing, on treatment of breach as entire, *Hart v. Wright*, 17 Wend. 267, 277; *Howard v. Hoey*, 23 Wend. 350; *Doane v. Dunham*, 65 Ill. 512; 79 Ill. 131; *Youghiogheny Iron and Coal Co. v. Smith*, 66 Pa. St. 340; *Pope v. Allis*, 115 U. S. 363, 371; and on acceptance of part, *Lewis v. Rountree*, 78 N. C. 323; *Cox v. Long*, 69 N. C. 7; *Polhemus v. Heiman*, 45 Cal. 572; *Barrekins v. Bevan*, 3 Rawle, 23, 44. Damages in each case: Hare on Contracts, §§ 537, 538. Excessive freight charges: *Johnson v. Latimer*, 71 Ga. 470, 472. No obligation to accept goods not shipped by the sellers themselves, as stipulated: *Cunningham v. Judson*, 30 Hun, 63, 67. Delay of delivery in cargoes: *Hill v. Chipman*, 59 Wis. 211, 216. When no recovery back of price, where part payment and refusal to accept: *Stevens v. Brown*, 60 Iowa, 403.

6 *Atlantic Phosphate Co. v. Grafflin*, 114 U. S. 492, 500.

7 · Bowser v. Birdsell, 49 Mich. 5, 6. No obligation in Lower Canada to pay price and afterwards get possession of goods from stranger: Prevost v. La Compagnie etc. Law R. 10 App. Cas. 643. Liability to pay reasonable worth of retained articles: Kirk v. Wolf Manuf. Co. 8 N. E. Rep. (Ill.) 815. Refusal to pay after acceptance: Mackey v. Swartz, 60 Iowa, 710, 712. Paying increased price as precluding action for breach of original contract: Rogers v. Rogers, 139 Mass. 440, 444.

§ 398. Damages for failure to deliver.—*General rule.*

Where the seller fails altogether to deliver, the common remedy is by a personal action against the seller for damages caused by his breach of contract;<sup>1</sup> and the measure of damages is, in general, according to the declared rule of England and America,<sup>2</sup> the difference between the price contracted for and the market price of the goods at the time when, and the place where delivery was due.<sup>3</sup>

*When price paid.* And when the price of the goods has been paid, the measure of damages is the entire market price.<sup>4</sup>

*Nominal damages.* The buyer may recover nominal damages, however, even if it appears that the goods could have been bought for less than the price agreed on at the time and place of delivery.<sup>5</sup>

*Special damages.* And one of the exceptions to the general rule is that when the articles purchased are bought for a specific purpose, and such purpose is made known to the seller at the time of the contract, there may be a recovery of special damages resulting from the inability of the purchaser to carry out such purpose by reason of the breach of contract.<sup>6</sup>

*Loss of profits on sub-sale.* Where the vendor knows that the buyer has an existing contract for resale at a profit, and that the purchase is expressly to fulfill such contract, the profits which would accrue from such sale would be recoverable, provided the buyer was unable to supply himself by going into the market and purchasing the same kind of goods.<sup>7</sup>

*Cost of replacing goods.* But in general, where the seller fails altogether to deliver, the loss to be made up as constituting the measure of damages is, as nearly as practicable, what it must have cost the buyer to go into the nearest market, and procure at retail, if necessary, the same kind of chattels, or those nearest approaching them in value, even though somewhat higher priced, for the purpose of use or of sub-sale, according to the natural or understood import of the transaction.<sup>8</sup>

*Nearest practicable market, etc.* If there be no market price at the precise place of delivery, where or whence such price is calculated, the basis of computation may be the nearest practicable market, with account taken of the enhanced expenses of transportation thereto, and of analogous items of reasonable scope.<sup>9</sup>

1 2 Schouler of Personal Property, § 571. Personal action: See 1 Abbott's Law Dict. 22.

2 See citations in next note, and *Hill v. Chipman*, 59 Wis. 211, 218; *Johnson v. Allen*, 78 Ala. 387; 56 Am. Rep. 34, 37; *Camors v. Madden*, 36 La. An. 425, 426.

3 2 Schouler on Personal Property, § 571, making following citations: *Barrow v. Arnaud*, 8 Q. B. 604, 609; *Boorman v. Nash*, 9 Barn. & C. 145; *Hadley v. Baxendale*, 9 Ex. 341; *Sedgwick's Cases on Damages*, 121; *Chinery v. Viall*, 5 Hurl. & N. 288; *Sedgwick's Cases on Damages*, 631; *Wilson v. Lancashire etc. R. R. Co.* 9 Com. B. N. S. 632; *Furlong v. Polleys*, 30 Me. 491; 50 Am. Dec. 635; *Gordon v. Norris*, 49 N. H. 376; *Sedgwick's Cases on Damages*, 220; *Bartlett v. Blanchard*, 13 Gray, 429; *Dana v. Fiedler*, 12 N. Y. 40; *Sedgwick's Cases on Damages*, 220; *Parsons v. Sutton*, 66 N. Y. 92; *McHose v. Fulmer*, 73 Pa. St. 355; *Sedgwick's Cases on Damages*, 347; *Knibs v. Jones*, 44 Md. 396; *Crawford v. Manuf. Co.* 88 N. C. 554; *Thompson v. Woodruff*, 7 Cold. 401; *Northrup v. Cook*, 39 Mo. 202; *Jemmison v. Gray*, 29 Iowa, 537; *Bennett's Benjamin on Sales*, § 870; *Story on Sales*, §§ 430, 448; *Sedgwick on Damages* (5th ed.), 289, 340. Consult, also, *Campbell on Sales*, 377; 2 *Corbin's Benjamin on Sales*, § 1305, n. 2, p. 1120.

4 *Moses v. Rasin*, 14 Fed. Rep. 772, 775. And see *Anderson v. Reed*, 51 N. Y. Sup. Ct. 326.

5 See *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 El. & E. 680; *Deere v. Lewis*, 51 Ill. 254; as cited, 2 Schouler on Personal Property, § 571. And consult *Moses v. Rasin*, 14 Fed. Rep. 772, 775.

6 *Hill v. Chipman*, 59 Wis. 211, 218; referring to *Shepard v. Milwaukee Gas Light Co.* 15 Wis. 318, 327; *Richardson v. Chynoweth*, 26 Wis. 656; *Chapman v. Ingram*, 30 Wis. 290; *Candee v. West. Union Tel. Co.* 34 Wis. 471; *Hammer v. Scoenfelder*, 47 Wis. 455; *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 626.

7 *Bell v. Reynolds*, 78 Ala. 511; 56 Am. Rep. 52, 54, 55; citing, *Messmore v. N. Y. Shot and Lead Co.* 40 N. Y. 422; *Sedgwick's Cases on Damages*, 402; *McHose v. Fulmer*, 73 Pa. St. 365; *Sedgwick's Cases on Damages*, 347; *Addison on Contracts* (Morgan's ed.), § 589; *Chicago Railroad Co. v. Hale*, 83 Ill. 360; 25 Am. Rep. 403. English doctrines concerning sub-contracts by buyer: See *Bennett's Benjamin on Sales*, § 877; reviewing, *Thol v. Henderson*, Law R. 8 Q. B. D. 457; *Hinde v. Liddell*, Law R. 10 Q. B. 265; 12 Eng. Rep. 296; *Borries v. Hutchinson*, 18 Com. B. N. S. 445; *Sedgwick's Cases on Damages*, 400; *Elbinger Co. v. Armstrong*, Law R. 9 Q. B. 473; *Sedgwick's Cases on Damages*, 350; *Hydraulic Engineering Co. v. McHaffie*, Law R. 4 Q. B. D. 670; *British Columbia Saw Mill Co. v. Nettleship*, Law R. 3 Com. P. 499; 37 Law J. Com. P. 235; *Sedgwick's Cases on Damages*, 170; *Horne v. Midland Ry. Co.* Law R. 7 Com. P. 583, and Law R. 8 Com. P. 131; *Sedgwick's Cases on Damages*, 170; *Williams v. Reynolds*, 6 Best & Smith, 495; *Dunkirk Colliery Co. v. Lever*, Law R. 9 Ch. D. 20; 41 L. T. N. S. 633; 43 L. T. N. S. 706. And consult, *Grehert-Borgnis v. Nugent*, Law R. 15 Q. B. D. 85.

8 See 2 *Schouler on Personal Property*, § 572; *Hinde v. Liddell*, Law R. 10 Q. B. 265; *Haskell v. Hunter*, 23 Mich. 305, 309.

9 See 2 *Schouler on Personal Property*, § 572; citing, *Haskell v. Hunter*, 23 Mich. 305; *Bourne v. Ashley*, 1 Low. 27; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 479; *Furlong v. Polleys*, 30 Me. 491; 50 Am. Dec. 635; *Burst v. Burton*, 47 N. Y. 167; *Pearce v. Carter*, 3 Houst. 385; *McCormick v. Hamilton*, 23 Gratt. 561; *Sedgwick on Damages* (5th ed.), 310. Final destination of goods coming from a distance: See *Heineman v. Heard*, 4 Thomp. & C. 666; *Crawford v. Manuf. Co.* 88 N. C. 554. Ascertainment of market price for jury: *Sedgwick on Damages* (5th ed.), 310; *Worthen v. Wilmot*, 30 Vt. 555; *Phelps v. McGee*, 18 Ill. 155.

‡ 399. **Restrictions on recovery.**—*Notice of exceptional circumstances, etc.* As in general it seems that the seller must reasonably have apprehended the loss to have followed his own breach, some notice of exceptional circumstances authorizing enhanced damages, if any existed, ought to have reached him in season to charge him personally, especially in the case of articles readily procurable in market.<sup>1</sup>

*Knowledge of sub-contract, etc.* So the damages actually paid to a sub-buyer for failure of the sub-sale, or loss of profit by losing the opportunity of the sub-sale, are too remote for a test, at least in the absence of special knowledge of the essential facts on the seller's part;<sup>2</sup> and even though it was known that the buyer had purchased the goods for the purposes of sub-sale, yet it has been held that damages ought not to be assessed so as to include the loss of profit on the sub-sale, where the

sub-contract was not known to the seller at the time of sale.<sup>3</sup>

1 Compare *Williams v. Reynolds*, 6 Best & Smith, 495; *Randall v. Roper*, El. B. & E. 84; *Fox v. Harding*, 7 Cush. 516. See, also, *Horae v. Midland R. R. Co.* Law R. 7 Com. P. 583, and Law R. 8 Com. P. 131; *Sedgwick's Cases on Damages*, 196. Source of paragraph: 2 *Schouler on Personal Property*, § 572. And compare *Story on Sales*, § 412. Seller's supposition of different and more obvious purpose; loss of profits not recoverable: *Cory v. Thames Iron Works Co.* Law R. 3 Q. B. 181. Parol evidence of special circumstances: *Brady v. Oastler*, 3 Hurl. & C. 112. Matters incidental to procuring the bargain: *Stevens v. Lyford*, 7 N. H. 360. And see *Crawford v. Manuf. Co.* 88 N. C. 554.

2 See *Borries v. Hutchinson*, 18 Com. B. N. S. 415; *Sedgwick's Cases on Damages*, 209; also, *Pa. R. R. Co. v. Titusville etc. Co.* 71 Pa. St. 350; *Wetmore v. Patterson*, 45 Mich. 439.

3 *Thol v. Henderson*, Law R. 8 Q. B. D. 457. But compare *Cockburn v. Ashburn Lumber Co.* 54 Wis. 619. New York rule: Compare *Messmore v. N. Y. Shot Co.* 40 N. Y. 422; *Sedgwick's Cases on Damages*, 302; *Booth v. Spuyten Duyvil Mill Co.* 60 N. Y. 487; *Sedgwick's Cases on Damages*, 331. Source of paragraph: 2 *Schouler on Personal Property*, § 572.

§ 400. *Suit for failure to deliver.—Prerequisites of demand, offer, etc.* Where no time of delivery was expressly or by implication fixed in the contract, the buyer should, in general, demand the goods before bringing suit, unless a demand would be useless by reason of the seller's waiver, disability to comply, etc.<sup>1</sup> In general, the buyer must offer payment before he can sue for non-delivery, unless credit was given or payment waived;<sup>2</sup> but a formal tender of payment is not a condition precedent, though the buyer must be ready and willing to pay.<sup>3</sup>

*Pleadings, evidence, etc.* In a declaration in a suit by the purchaser against the seller for breach of a contract, whereby the purchaser engages to deliver a designated number of pieces of timber as fast as water will permit, and not later than a specified date, it is essential to allege that the water was such as to permit the delivery, as this is evidently a condition of the contract to deliver.<sup>4</sup>

1 See 2 *Schouler on Personal Property*, 575; *Story on Sales*, § 453; *Wire v. Foster*, 62 Iowa, 114, 116. Like doctrine where delivery on request contracted for: See *Bennett's Benjamin on Sales*, § 878;

citing, *Bach v. Owen*, 5 Term Rep. 409; *Radford v. Smith*, 3 Mees. & W. 254; *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodrick*, 5 Barn. & Ald. 712. On whom demand to be made after death of party giving stock options: *Prince v. Robinson's Adm'rs.* 15 The Reporter, 163.

2 See *Parker v. Pettit*, 43 N. J. L. 512, 516; *Pinkus v. Hamaker*, 11 Serg. & R. 200; *Keeler v. Schmertz*, 46 Pa. St. 135, 139; *Mowry v. Kirk*, 19 Ohio St. 375, 383; *Simmons v. Green*, 35 Ohio St. 104; *Leonard v. Davis*, 1 Black, 476, 483; *Metz v. Albrecht*, 52 Ill. 491; *Wire v. Foster*, 62 Iowa, 114.

3 See *West v. Platt*, 127 Mass. 367, 370; *Bear v. Hornish*, 3 Brewst. 113; *Robison v. Tyson*, 46 Pa. St. 286, 292; *Thompson v. Warner*, 31 Kan. 533. Sources of paragraph: 2 Corbin's *Benjamin on Sales*, § 1305, n. 1, and § 897, n. 23; 2 Schouler on *Personal Property*, § 575; *Thompson v. Warner*, 31 Kan. 533; *Wire v. Foster*, 62 Iowa, 114.

4 *Stokes v. Barss*, 18 Fla. 656, 668. Admissible evidence under general denial: *Davis v. McCrocklin*, 34 Kan. 218, 219, 221; 8 Pac. Rep. 196. Repeated failures to make delivery held to authorize a rescission of the contract: *Ballman v. Burt*, 17 The Reporter (Md.) 749. Remedies of buyer who has paid price: See *Nash v. Towne*, 5 Wall. 680; *Cleveland v. Sterrett*, 70 Pa. St. 204, 209; *Coffield v. Clark*, 2 Colo. 101; *Hill v. Smith*, 32 Vt. 403; *Boutell v. Warne*, 62 Mo. 350, 353. Sources of these citations: 2 Schouler on *Personal Property*, § 573; *Bennett's Benjamin on Sales*, § 870, n. b; 2 Corbin's *Benjamin on Sales*, § 1305, n. 1, p. 1120. And see *Sedgwick on Damages* (5th ed.), pp. 291, 292, et seq. 304.

## ‡ 401. Where title in buyer.—*Remedies as owner.*

Where the contract which has been broken by the vendor is one in which the property has passed to the buyer, there arise in the latter the rights of an owner, as he has not only the title but also the right of possession of the goods, defeasible only on his own default in complying with his duty of accepting and paying for them.<sup>1</sup> Under such circumstances the buyer has not only the right of action for damages, which is common to all parties to contracts of every kind, and was formerly the only remedy for such breach at common law, but he has also the right to enforce delivery of the specific chattel sold, and may maintain trover on the vendor's refusal to deliver.<sup>2</sup>

*Specific performance.* In regard to specific performance of contracts for the sale and delivery of personal property, it is declared that there are many exceptions to the general rule denying this remedy, founded principally upon the inadequacy of the remedy in damages

at common law in the particular case, or upon the special and peculiar nature and value of the subject-matter.<sup>3</sup> And it is more precisely stated that the buyer has been allowed to resort to the equitable remedy of specific performance where the subject-matter of the sale was an incorporeal chattel, such as shares of stock, or something rare and of marked intrinsic value, if corporeal, as a statue, a painting, or an antique vase, and the buyer with the right of possession in himself could not be made whole by giving him damages.<sup>4</sup>

1 See Bennett's Benjamin on Sales, § 883.

2 Bennett's Benjamin on Sales, § 884. And see 2 Schouler on Personal Property, § 576. Specific performance of contracts for sale of personalty: See succeeding subdivision of section. Trover for conversion of goods: See Campbell on Sales, 383; Story on Sales, § 413; Bennett's Benjamin on Sales, § 886; 2 Corbin's Benjamin on Sales, § 1341, n. 15; 2 Schouler on Personal Property, § 577, and following cases cited by these writers; *Chinery v. Viall*, 5 Hurl. & N. 283; 29 Law J. Ex. 280; *Sedgwick's Cases on Damages*, 631; *Gillard v. Brittain*, 8 Mees. & W. 575; *France v. Gaudet*, Law R. 6 Q. B. 199; *Johnson v. Lancashire etc. Ry. Co.* Law R. 3 C. P. D. 499; *Lord v. Price*, Law R. 9 Ex. 54; *Johnson v. Dickenson*, 78 N. Y. 42; *Bowser v. Birdsell*, 49 Mich. 5.

3 *Equitable Gaslight Co. v. Baltimore Coal Tar etc. Co.* 63 Md. 285, 299.

4 2 Schouler on Personal Property, § 576; citing, 2 Kent Com. 487; Story on Sales, § 413. And see Bennett's Benjamin on Sales, § 884, n. w; citing, *Falcke v. Gray*, 4 Drew. 653; 29 Law J. Ch. 28; *Pusey v. Pusey*, 1 Vern. 273; *Binney v. Annan*, 107 Mass. 94; *Somerby v. Bunton*, 118 Mass. 287; *Corbin v. Tracy*, 34 Conn. 325; *Noyes v. Marsh*, 123 Mass. 286; *Fell's Appeal*, 91 Pa. St. 434; *Ferguson v. Paschall*, 11 Mo. 267; *Sarter v. Gordon*, 2 Hill Eq. 121; *Young v. Burton*, 1 McMull. Eq. 555. Consult, also, *Equitable Gas Light Co. v. Baltimore Coal Tar etc. Co.* 63 Md. 285, 289; citing, *Pomeroy on Specific Performance*, § 115, p. 20; *Buxton v. Lister*, 3 Atk. 382.

§ 402. *Delay in delivery.—Choice of remedies.* Where the delivery is unreasonably late, the buyer upon a tender of the goods may either refuse them, or receive them under objection and claim damages resulting from the delay.<sup>1</sup>

*Where delivery in instalments.* Where the contract is for the sale of personal property, to be delivered in instalments at fixed times, the failure to deliver any instalment at the time agreed upon is a breach of the

contract, for which the purchaser could doubtless maintain an action without waiting until the time for the delivery of the last instalment had passed.<sup>2</sup> And upon a failure to deliver two or more or all of the instalments, each of the failures constitutes a separate and distinct breach, and the measure of damages is the sum of the differences between the contract and the market prices of the quantity of each instalment not delivered at the respective times and places of delivery.<sup>3</sup>

1 See 2 Schouler on Personal Property, § 591; Story on Sales, § 450; Merrimack Manuf. Co. v. Quintard, 107 Mass. 127. And consult Phillips v. Taylor, 4 N. E. Rep. (N. Y.) 727; S. C. below, 49 N. Y. Sup. Ct. 318. Measure of damages where delay caused by persistence in refusal to deliver, but there was ultimate delivery and acceptance: Boomer v. Flagler, 51 N. Y. Sup. Ct. 211. Damages for delay in delivery of chattel, like ship or steam-engine, from whose use profits derivable: See 2 Schouler on Personal Property, § 572.

2 Hill v. Chipman, 59 Wis. 211, 218.

3 Johnson v. Allen, 78 Ala. 387; 56 Am. Rep. 34, 37. And consult 1 Sedgwick on Damages (7th ed.), 558, n. b; Missouri Furnace Co. v. Cochran, 3 Fed. Rep. 463; Brown v. Muller, Law R. 7 Ex. 319; 3 Eng. Rep. 429; Roper v. Johnson, Law R. 8 Com. P. 167; Sedgwick's Cases on Damages, 336; Ex parte Llansamlet Tin Plate Co. Law R. 16 Eq. 155, 6 Eng. Rep. 689; Frost v. Knight, Law R. 7 Ex. 111; Bergheim v. Blaenavon Iron Co. Law R. 10 Q. B. 319; 13 Eng. Rep. 264; Elbinger Actien-Gesellschaft v. Armstrong, Law R. 9 Q. B. 473; Sedgwick's Cases on Damages, 359; Burtis v. Thompson, 42 N. Y. 246; Shreve v. Brewton, 51 Pa. St. 176.

§ 403. Divergence of goods from contract.— *Quality of unascertained goods* It is laid down that where goods of a specified quality not in existence or ascertained are sold, and the seller undertakes to ship them to a distant buyer, and when they are made or ascertained, delivers them to a carrier for the buyer, the latter has the right, if on their arrival they are not of the quality required by the contract, to reject them and rescind the sale, and if he has paid for them, to recover back the price in a suit against the seller.<sup>1</sup>

*Variance from description.* So it is said to be a proposition everywhere admitted to be law, that if one who has not seen them orders goods of a certain description,



at a certain price, and the goods do not answer the description, he may return them or offer to return them within a certain time.<sup>2</sup>

*Breach of warranty.* Upon the discovery of a breach of warranty, the buyer has the election either to rescind the contract by returning the property, or to sue on the warranty for the recovery of damages.<sup>3</sup> But it has been declared that if he elects to rescind the contract, the law requires that he should make the election at once, or at least within a reasonable time after he discovers the breach, instead of continuing to use the property for a year or more afterwards.<sup>4</sup>

*Objections to articles.* The rule that one cannot rescind a contract in part, and affirm it in part, does not apply to a case which is not one of rescission at all, but where the purchaser refuses to accept an article which varies from the description of it contained in an itemized bill of sale of vehicles, and sues the vendor for failure to fulfill the contract of sale.<sup>5</sup>

1 Pope v. Allis, 115 U. S. 363, 372; 6 Sup. Ct. Reporter, 69, 72, with note, 73; citing, Norrington v. Wright, 115 U. S. 183; and referring to Filley v. Pope, 115 U. S. 213, and various cases which treat descriptive statements as conditions.

2 Cohen v. Pemberton, 53 Conn. 221; 55 Am. Rep. 101; citing, McIntyre v. McIntyre, 12 Ired. 79; Waldo v. Halsey, 3 Jones (N. C.) 107; and comparing Gardner v. Lane, 12 Allen, 44; 85 Am. Dec. 779.

3 Upton Manuf. Co. v. Huiske, 29 N. W. Rep. (Iowa) 621; citing, Aultman v. Theirer, 34 Iowa, 274; Rogers v. Hanson, 35 Iowa, 283; McCormick v. Dunville, 36 Iowa, 645; King v. Towsley, 64 Iowa, 75; 19 N. W. Rep. 859. And consult Weybrich v. Harris, 31 Kan. 92; § 352, discussing generally, REMEDIES FOR BREACH OF WARRANTY.

4 Upton Manuf. Co. v. Huiske, 29 N. W. Rep. 621, 623, n. 624. And see Paulson v. Osborne, 27 N. W. Rep. (Minn.) 206. Compare Frank v. Hollander, 35 La. An. 1582.

5 Lampson v. Cummings, 52 Mich. 492, 497. Compare Argensinger v. Cline, 28 N. W. Rep. 435.

# CHAPTER XXXVI.

## RESALE.

- § 404. Right of resale.
- § 405. Mode of resale.
- § 406. Recovery after resale.

§ 404. **Right of resale.**—*In general.* If a vendee of goods unreasonably refuses to accept the goods, the vendee is under no obligation to allow them to perish on his hands, or to become reduced in value;<sup>1</sup> but he may sell them at auction,<sup>2</sup> and hold the buyer responsible for the difference between the price which the goods actually brought and the price which the purchaser agreed to give.<sup>3</sup>

*Election of seller.* And it has been considered to be at the election of the seller whether he will resell, or treat the property as the vendee's, and sue for the entire contract price.<sup>4</sup>

*English doctrine.* But in England, a resale in the absence of an express reservation thereof, is a technical breach of contract and ground for at least nominal damages, though it does not rescind the sale, and is not so tortious that the buyer can recover back any deposit of the price, or resist payment of any balance thereof, or sue the vendor in trover except for a premature resale<sup>5</sup> before default.<sup>6</sup>

1 Van Horn v. Rucker, 33 Me. 391, 392; 84 Am. Dec. 52. And see Maclean v. Dunn, 4 Bing. 722; Langdell's Cases on Sales, 390, 394.

2 Compare § 405, on MODE OF RESALE.

3 Van Horn v. Rucker, 33 Mo. 391, 392; 84 Am. Dec. 52. And see 2 Kent Com. 505; Atwood v. Lucas, 53 Me. 508, 511; 89 Am. Dec. 713; Crooks v. Moore, 1 Sand. 297, 302, 303; Sands v. Taylor, 5 Johns. 395; Lewis v. Greider, 49 Barb. 606; Bogart v. O'Regan, 1 Smith, E. D. 590, 592; Adams v. Mirick, cited, 5 Serg. & R. 32; Rosenbaums v. Weeden, 18 Gratt. 785, 790-792; White v. Kearney, 9 Rob. (La.) 495, 501, 502; Judd etc. Oil Co. v. Kearney, 14 La. An. 352; Williams v. Godwin, 4 Sneed,

557, 558, 559; *Johnson v. Powell*, 9 Ind. 566; *Saladin v. Mitchell*, 45 Ill. 85. Compare *West v. Cunningham*, 9 Port. 104, 107; *Schmertz v. Dwyer*, 53 Pa. St. 335, 339. No recovery where refusal to accept goods which the evidence indicates were not merchantable or according to samples: See *Duncan v. Holt*, 21 La. An. 235. Resale by buyer: See *Barnett v. Terry*, 42 Ga. 283, 289; *Youghiogheny Iron Co. v. Smith*, 66 Pa. St. 340, 344; *Walker v. Gooch*, 10 Biss. 153, 163; *Bach v. Levy*, 50 N. Y. Sup. Ct. 519, 522; S. C. 5 N. E. Rep. 345.

4 *Hunter v. Wetsell*, 84 N. Y. 549, 555. Waiver of right to either course by not setting apart the article bought as the property of the rejecting buyer: *Ganson v. Madigan*, 13 Wis. 67; 15 Wis. 144, 151. Resale without buyer's stipulation or consent: *O'Brien v. Jones*, 47 N. Y. Sup. Ct. 67, 75. Seller's choice of remedies: *Dunstan v. McAndrew*, 44 N. Y. 72, 78; *Hayden v. Demets*, 53 N. Y. 426; 2 Kent Com. 504; 1 *Sedgwick on Damages* (7th ed.), 596, n. a. And see *Gordon v. Norris*, 49 N. H. 376, 383; *Haines v. Tucker*, 50 N. H. 307, 313; *Whitney v. Boardman*, 118 Mass. 242-248; *Schultz v. Bradley*, 4 Daly, 29, 36; *Barr v. Logan*, 5 Har. (Del.) 52, 55; *Camp v. Hamlin*, 55 Ga. 259; *Bell v. Offutt*, 10 Bush, 632, 639; *Shawhan v. Van Nest*, 25 Ohio St. 430, 499; 15 Am. Law Reg. N. S. 153, 160; *Rickey v. Tenbroeck*, 63 Mo. 567.

5 In this country it has been held that on a premature resale, the buyer can recover in trover only the amount of his part payment, without costs, after refusing to receive it back: *Bowser v. Birdsell*, 49 Mich. 5.

6 See *Maclean v. Dunn*, 4 Bing. 722; *Langdell's Cases on Sales*, 390, 394; *Stephen v. Wilkinson*, 2 Barn. & Adol. 320; *Gillard v. Brittain*, 8 Mees. & W. 575; *Page v. Cowasjee*, Law R. 1 P. C. 127, 145; *Lamond v. Davall*, 9 Q. B. 1030; *Chinery v. Viall*, 5 Hurl. & N. 288; *Martindale v. Smith*, 1 Q. B. 395; *Ogg v. Shuter*, Law R. 1 C. P. D. 347; 15 Eng. Rep. 231; *Valpy v. Oakeley*, 16 Q. B. 491; *Griffiths v. Perry*, 1 El. & E. 680.

§ 405. *Mode of resale.*—*In general.* There is no rule of law which requires resales, made by the seller in case of the purchaser's failure to take and pay for the articles sold, to be made at auction, or in any particular mode.<sup>1</sup> But the seller may sell the article which the buyer refuses to receive, at private sale, through a broker or in any other reasonable manner sanctioned by usage or custom, and best calculated to produce the value of the goods.<sup>2</sup>

*Restrictions on seller.* And all that is required of the seller, if he elects to resell, is that he should act with reasonable care and diligence, such as would be required from any other agent of the owner, put in possession of the goods, with instructions to sell them to the best advantage.<sup>3</sup>

*Place of resale.* If a sale cannot be made to advantage in the place of delivery fixed by the contract, the seller should go where he can get the best price and readiest sale, not out of the usual course in marketing such property.<sup>4</sup>

*Time of resale.* It is sufficient if the resale be made within a reasonable time after rejection;<sup>5</sup> and notice that goods would not be received or paid for does not oblige the seller to resell before the day fixed for delivery.<sup>6</sup> But when the property is kept after the buyer's default in order to profit by a rise in the market, the seller cannot charge the expense of keeping it to the buyer.<sup>7</sup>

*Notice.* In order to entitle the vendor to proceed by resale, instead of by rescission or by action for the whole price, he must manifest his election by preliminary notice of his intention to sell, stating in terms or effect that he will assert his right of resale, and bind the buyer by the price obtained and hold him for the loss sustained.<sup>8</sup> But it is now generally assumed that no notice of the time and place of the resale itself is necessary, in the absence of special stipulation or circumstances, where the extent of the vendee's liability is not to be materially decided by the price obtained.<sup>9</sup>

1 Crooks v. Moore, 1 Sand. 297. But resale at auction customary: 2 Kent Com. 504; Sands v. Taylor, 5 Johns. 395. Justified where goods perishable, expensive to keep, or likely to go out of season: Camp v. Hamlin, 55 Ga. 259. And see Ullman v. Kent, 60 Ill. 271. Accounting for conduct and proceeds of auction: Camp v. Hamlin, 55 Ga. 251. And see Smith v. Pettie, 70 N. Y. 13, 18; Brownlee v. Bolton, 44 Mich. 218; Knowlton v. Banigan, 51 N. Y. Sup. Ct. 521, 527. Title through resale at auction: O'Brien v. Jones, 47 N. Y. 67, 75, 76.

2 Crooks v. Moore, 1 Sand. 297. And see Haines v. Tucker, 50 N. H. 307, 313; Pollen v. Le Roy, 30 N. Y. 549.

3 See Dunstan v. McAndrew, 44 N. Y. 72; Bagley v. Findlay, 82 Ill. 524. And consult White v. Kearney, 2 La. An. 641. Seller directly or indirectly buying in goods: Judd etc. Oil Co. v. Kearney, 14 La. An. 352. And compare Cullen v. Bimm, 37 Ohio St. 236, 238.

4 Lewis v. Greider, 49 Barb. 606. And see McGibbon v. Schlesinger, 18 Hun, 225. But compare Chapman v. Ingram, 30 Wis. 290, 295; Rickey v. Tenbroeck, 63 Mo. 563, 567.

5 Smith v. Pettie, 70 N. Y. 13, 18. And see Linden v. Eldred, 49 Wis. 305, 313, 314; Rosenbaum v. Weeden, 18 Gratt. 785, 797. Compare

*Saladin v. Mitchell*, 45 Ill. 79, 85, 86. And see *Tilt v. La Salle Silk Co.* 5 Daly, 19, 26, 27.

6 *Kadish v. Young*, 108 Ill. 170; 48 Am. Rep. 548, 549. When seller held to have waited a reasonable time: *Bogart v. O'Regan*, 1 Smith, E. D. 590, 592. Compare *Crooks v. Moore*, 1 Sand. 293, 303.

7 *Thurman v. Wilson*, 7 Ill. 312, 314. Effect of too great delay in making resale: *Pickering v. Bardwell*, 21 Wis. 562, 566; *Brownlee v. Bolton*, 44 Mich. 218, 220.

8 *Holland v. Rea*, 48 Mich. 218, 224. And see *Fancher v. Goodman*, 29 Barb. 315; *Redman v. Smock*, 28 Ind. 365, 370. Consult, also, *Granberry v. Frierson*, 2 Baxt. 326. Compare *Ashbrook v. Hite*, 9 Ohio St. 357. Presumption of rescission: See *Sloane v. Van Wyck*, 4 Abb. N. Y. App. 250. Sufficiency of commencement of action for breach of contract in failing to take the goods: *Saladin v. Mitchell*, 45 Ill. 79, 85. Sufficiency of one day's notice: *Crooks v. Moore*, 1 Sand. 297.

9 *Holland v. Rea*, 48 Mich. 218. And see *Rosenbaums v. Weeden*, 18 Gratt. 785; *Lewis v. Greider*, 49 Barb. 606; *Hickock v. Hoyt*, 33 Conn. 553, 558. Consult, also, *Pollen v. Le Roy*, 30 N. Y. 549, 556; *Gaskell v. Morris*, 7 Watts & S. 32; *West v. Cunningham*, 9 Port. 104, 107; *Hughes v. United States*, 4 Ct. of Cl. 64; *George v. Kimball*, 14 Up. Can. Q. B. 514. Notice of public sale held sufficient: *Lindon v. Eldred*, 49 Wis. 305, 315. Failure to give notice held not injurious: *Ball v. Campbell*, 30 Kan. 177.

§ 406. **Recovery after resale.**—*Ordinary view.* After a resale the seller may ordinarily recover the difference between the contract price and the net proceeds of the resale, exclusive of expenses.<sup>1</sup>

*Special view.* But some of the cases hold that a resale, though the usual, is not the only or decisive mode of ascertaining damages, and that, however fair, it does not exclude other evidence of the market price.<sup>2</sup>

*Goods not separately resold, etc.* And where the goods cannot be separately resold, but are mingled with others, the sellers should account for the highest price obtained.<sup>3</sup>

1 See *Crooks v. Moore*, 1 Sand. 297; *Whitney v. Boardman*, 118 Mass. 242, 248. And consult *Springer v. Berry*, 47 Me. 330, 339; 1 Sedgwick on Damages (7th ed.), 593, n. b, and cases cited. Commissioners allowed seller where found that buyers had no right to return goods: *Stone v. Browning*, 49 Barb. 244, 249. Count for goods bargained and sold not maintainable: *Hass v. Thompkins*, 2 Pa. L. J. 17. And see *Hagedorn v. Laing*, 6 Taunt. 162, 166.

2 *McCombs v. McKennan*, 2 Watts & S. 216, 219; *Andrews v. Hoover*, 8 Watts, 239; *Girard v. Taggart*, 5 Serg. & R. 19; *West v. Cunningham*, 9 Port. 104, 107. And compare *Bach v. Levy*, 5 N. E. Rep. (N. Y.) 345; *Bigelow v. Legg*, 6 N. E. Rep. (N. Y.) 107.

3 *Cousinery v. Pearsall*, 40 N. Y. Sup. Ct. 113, 117. Liability of seller where better price obtained than that contracted for: *Granberry v. Frierson*, 2 Baxt. 326.

## CHAPTER XXXVII.

### SELLER'S LIEN.

- § 407. In general.
- § 408. Withholding or countermanding delivery.
- § 409. Giving credit.
- § 410. Sub-sale and estoppel.

§ 407. In general.— *Where credit not given, etc.* A seller of chattels has, until delivery, a lien upon them for the price, if no credit be stipulated.<sup>1</sup> And where goods are to be paid for on delivery, but on their delivery the vendee refuses to pay for them, the vendee has a lien for the price, and may resume possession of the goods.<sup>2</sup>

*Extinction by unconditional surrender of possession.* But in general, the right of lien depends upon the possession, and to maintain it a vendor must have the actual or constructive possession of the goods,<sup>3</sup> so that there is no lien for the purchase money of goods with the possession of which the vendor parts absolutely and unconditionally;<sup>4</sup> and the principle that the surrender of possession is the extinction of a lien, applies especially when the surrender is to a purchaser from the vendor against whom the lien exists in favor of his factor.<sup>5</sup> So on a sale of goods, even for cash, if the possession is delivered unconditionally to the purchaser, without any fraud on his part, the title at once vests in him, although the purchase money is paid, and the creditor can assert no lien on the goods for the unpaid purchase money.<sup>6</sup>

*Constructive delivery.* And it is generally regarded as immaterial, in regard to the extinction of the lien, whether the delivery be actual or constructive,<sup>7</sup> so that

a delivery of goods to a common carrier, to be by him transported to the buyer, is held a delivery to the buyer such as divests the seller of his lien.<sup>8</sup>

*Reservation of lien.* Liens may be created by contract, which may stipulate the mode in which the lien shall be effectuated, continued, or rescinded.<sup>9</sup> Nor is there any rule of law to defeat a stipulation in a contract of sale of personal property, that the vendor shall retain a lien until payment,<sup>10</sup> even after delivery of the goods.<sup>11</sup>

*Notice.* There are statutory enactments in some of the States making provision concerning notice of a seller's lien, affecting subsequent purchasers and creditors, by means of instruments, witnessed or recorded, etc.<sup>12</sup>

1 See *Clark v. Draper*, 19 N. H. 419, 421; *Parks v. Hall*, 2 Pick. 206, 211; *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 756. And consult *Barrett v. Pritchard*, 2 Pick. 512, 515; *Haskins v. Warren*, 115 Mass. 514, 533; *Milliken v. Warren*, 57 Me. 46, 50. But compare *Beam v. Blanton*, 3 Ired. Eq. 59, 62. Nature of this lien: *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754. And see *White v. Welsh*, 38 Pa. St. 396, 420; *Griffiths v. Perry*, 1 El. & E. 680; *McEwan v. Smith*, 2 H. L. Cas. 309, 328; *Dodsley v. Varley*, 12 Ad. & E. 632, 634; *Langdell's Cases on Sales*, 155. A tender of the price, even if not accepted, has been held to put an end to the lien upon the goods sold: *Martindale v. Smith*, 1 Q. B. 389, 395, 396. And see *Dempsey v. Carson*, 11 Up. Can. Q. B. 432, 466. But compare *Minzesheimer v. Helne*, 4 Smith, E. D. 65, 67; *Merchant Banking Co. v. Phoenix Bessemer Steel Co.* Law R. 5 Ch. D. 205; 22 Eng. Rep. 33, 46. Vendor's privilege in Louisiana: See *Whiston v. Stodder*, 8 Mart. (La.) 135; 13 Am. Dec. 281; *Copley v. Sanford*, 2 La. An. 335; 46 Am. Dec. 548; *Converse v. Hill*, 14 La. An. 89; *Flint v. Rawlings*, 20 La. An. 557; *Loeb v. Blum*, 25 La. An. 232, 233; *Furniss's Succession*, 34 La. An. 1013.

2 *Palmer v. Hand*, 13 Johns. 439; 7 Am. Dec. 392. Lien where agreed mortgage on goods for price not executed: *Alexander v. Heriot*, 1 Bail. Eq. 223, 225. And see *Husted v. Ingraham*, 75 N. Y. 251. No lien where agreement by buyer against further sale of chattel until price paid: *Welsh v. Parrish*, 1 Hill (S. C.) 155, 163. Seller not bound to relinquish lien where terms of public sale not complied with: *Wade v. Moffitt*, 21 Ill. 110.

3 *Parks v. Hall*, 2 Pick. 206, 212. And see *Jenkins v. Elchelberger*, 4 Watts, 121; 28 Am. Dec. 691, n. 694.

4 *Blackshear v. Burke*, 74 Ala. 239, 242. And see *James v. Bird's Adm'r*, 8 Leigh, 510; 31 Am. Dec. 668, 669; *Beam v. Blanton*, 3 Ired. Eq. 59; *Lupin v. Marie*, 6 Wend. 77; 21 Am. Dec. 256, 259, 261; *Wilkie v. Day*, 6 N. E. Rep. (Mass.) 542. Cases illustrating requisites of delivery to destroy seller's lien: See *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757. After the goods come into the possession of the

buyer the lien is extinguished: *Parks v. Hall*, 2 Pick. 206, 212. And see *Freeman v. Nichols*, 116 Mass. 309; *Lupin v. Marie*, 6 Wend. 77; 21 Am. Dec. 256, 259-261; *Welsh v. Bell*, 32 Pa. St. 12, 17; *Johnson v. Farnum*, 56 Ga. 144, 145; *Boyd v. Mosely*, 2 Swan, 661, 662; *Barnett v. Mason*, 7 Ark. 253, 256. Compare *Musson v. Elliott*, 30 La. An. pt. 1, 147, 151.

5 *Gwyn v. Richmond etc. R. R. Co.* 85 N. C. 429; 39 Am. Rep. 708, 710. Lien lost where delivery to buyer's servant on express condition that title to remain in seller until payment of note for balance of price: *Helm v. Dumars*, 3 Cal. 454.

6 *Blackshear v. Burke*, 74 Ala. 239, 242. But compare *Husted v. Ingraham*, 75 N. Y. 251. Marked distinction between delivery to pass title and to destroy lien: *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 756. See *Thompson v. Baltimore etc. R. R. Co.* 28 Md. 396, 406.

7 See *Parks v. Hall*, 2 Pick. 206, 212. And consult *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; *Mason v. Hutton*, 41 Up. Can. Q. B. 610. But see *White v. Welsh*, 38 Pa. St. 396, 420; *Southwest Freight Co. v. Stanard*, 44 Mo. 71, 84; *Southwest Freight Co. v. Plant*, 45 Mo. 517, 519; *Thompson v. Baltimore, etc. R. R. Co.* 28 Md. 396, 407. Delivery of part: See *Hamberger v. Rodman*, 9 Daly, 93; *Hewlett v. Flint*, 7 Cal. 264.

8 *Boyd v. Moseley*, 2 Swan, 661, 663.

9 *Sawyer v. Fisher*, 32 Me. 28. Liens in general: See *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754; 2 *Bouvier Law Dict.* tit. Lien; *Bradeen v. Brooks*, 22 Me. 462, 471, 472.

10 *Sawyer v. Fisher*, 32 Me. 23.

11 *Gregory v. Morris*, 96 U. S. 619, 623. Instrument reserving lien as notice: *Bunn v. Valley Lumber Co.* 51 Wis. 376. Reservation of lien upon articles as fast as they are manufactured from property sold: *Dunning v. Stearns*, 9 Barb. 630, 633. Compare *Burnham v. Marshall*, 56 Vt. 365. Reservation of lien on timber-trees, remaining after possession authorized by contract, taken by buyer: *Bradeen v. Brooks*, 22 Me. 453, 471. But compare *Douglas v. Shumway*, 13 Gray, 498. And see generally, *Barnett v. Mason*, 7 Ark. 253; *Obermeier v. Core*, 25 Ark. 562, 564. Oral reservation of lien: See *Gay v. Harde-man*, 31 Tex. 245, 250; *Burnham v. Marshall*, 56 Vt. 365.

12 See *Bugbee v. Stevens*, 53 Vt. 389, 391; *Barber v. Richardson*, 57 Vt. 303; *McClenney v. McClenney*, 3 Tex. 192, 197; *Bunn v. Valley Lumber Co.* 51 Wis. 576; *Naylor v. Young*, 7 Lea, 735; *Loeb v. Blum*, 25 La. An. 232.

‡ 408. *Withholding or countermanding delivery.*—*General doctrine.* The rule is said to be, that so long as the vendor has the actual possession of the goods, or as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances.<sup>1</sup> And where personal property is sold on credit, if before the possession is delivered the vendee becomes insolvent, the vendor may



protect himself, if payment has not been made when the credit expires, by refusing to deliver possession.<sup>2</sup>

*Applications.* This doctrine of the seller's right to withhold or recall delivery has been applied to a sale of wood marked off and identified, but not taken away by the purchaser,<sup>3</sup> and of iron pointed out for purposes of delivery.<sup>4</sup> So where the vendors were also warehousemen of the goods sold, under an arrangement with the purchasers to pay warehouse rent, it was held that the vendor's lien revived upon the insolvency of the vendees.<sup>5</sup>

*Giving delivery order, etc.* And in England, the vendor of goods may stop their delivery under his lien for the price, even if he has given a delivery order for the goods, if such order has not been presented to the warehouseman or other custodian of the goods, and recognized by him.<sup>6</sup> In this country, it has also been held that the indorsement and transfer of a delivery order does not divest the seller of his lien over goods still in his agent's possession and not yet paid for.<sup>7</sup>

1 *White v. Welsh*, 38 Pa. St. 396, 420. And see *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757; *Hunter v. Talbot*, 3 Smedes & M. 754; *Valpy v. Oakeley*, 16 Q. B. 941, 950. But compare *Dodsley v. Varley*, 12 Ad. & E. 632; *Langdell's Cases on Sales*, 155. Insolvency of third person upon whose credit goods were sold, held sufficient: *Wanamaker v. Yerkes*, 70 Pa. St. 443, 445. Immaterial whether the sale is of specific chattels, or an executory contract to supply goods: *Griffiths v. Perry*, 1 El. & E. 680. And see *Ex parte Chalmers*, Law R. 8 Ch. 289, 291. Destruction of goods withheld from buyer: *Safford v. McDonough*, 120 Mass. 290.

2 *Hunter v. Talbot*, 3 Smedes & M. 754, 761.

3 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754.

4 *Thompson v. Baltimore etc. R. R. Co.* 28 Md. 396.

5 *Grice v. Richardson*, Law R. 3 App. Cas. 319; 24 Eng. Rep. 241.

6 *McEwan v. Smith*, 2 H. L. Cas. 309. And see *Griffiths v. Perry*, 1 El. & E. 680. Compare *Pooley v. Great Eastern Ry. Co.* 34 L. T. N. S. 537.

7 *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 81. Countermanding warehouse order: *Keeler v. Goodwin*, 111 Mass. 490, 491, 492. Refusal to transfer warehouse receipt: *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447, 454.

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§ 409. Giving credit.— *As waiver of lien.* When a credit is given by agreement, the vendee has a right, in the absence of a contrary usage of trade,<sup>1</sup> to the custody and actual possession of the goods on a promise to pay at a future time;<sup>2</sup> and if he takes the goods away, and into his own charge, the lien of the vendor is gone,<sup>3</sup> unless there is an agreement to the contrary,<sup>4</sup> since it is a right dependent on possession.<sup>5</sup> But it is said that the law, in holding that a vendor who has thus given credit for the goods waives his lien for the price,<sup>6</sup> does so on the one implied condition that the vendor shall keep his credit good.<sup>7</sup>

*Insolvency of buyer where possession retained or regained.* Hence, if before payment the vendee becomes bankrupt or insolvent, and the vendor still retains possession of the goods or any part of them,<sup>8</sup> or if the goods are in the hands of a carrier, on their way to the vendee, and the vendor, before they have got into the actual possession of the vendee, can regain his actual possession by a stoppage *in transitu*,<sup>9</sup> then his lien is restored, and he may hold the goods as security for the price.<sup>10</sup>

*Taking notes, etc.* And the rule of law giving the vendor this common-law lien for the unpaid price, whereby he may hold goods, whose possession he has retained or regained, against a defaulting and insolvent buyer, is applicable though a negotiable promissory note has been given for the purchase money,<sup>11</sup> if it remains in the hands of the vendor, and has not been negotiated, so that it may be delivered up on discharge of the lien.<sup>12</sup> In England, it seems to be considered that upon the dishonor of bills of exchange for the price, or the open insolvency of purchaser, before delivery has been made, the vendor's suspended lien revives, and delivery will not be required.<sup>13</sup>

- 1 See *Field v. Lelean*, 6 Hurl. & N. 6, 7.
- 2 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 756. And see *Spartall v. Benecke*, 10 Com. B. 212, 221; *Leonard v. Davis*, 1 Black, 476, 483.
- 3 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757.
- 4 See *Gregory v. Morris*, 96 U. S. 619.
- 5 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757.
- 6 Waiver of lien in general: *Pickett v. Bullock*, 52 N. H. 354; *Outcalt v. Durling*, 1 Dutch. 443, 448; *Dempsey v. Carson*, 11 Up. Can. C. P. 462, 466.
- 7 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757. See *Thompson v. Baltimore etc. R. R. Co.* 23 Md. 396, 406, 407.
- 8 See *Grice v. Richardson*, Law R. 3 App. Cas. 319; 24 Eng. Rep. 214.
- 9 *Stoppage in transitu*: See subsequent chapter on that subject.
- 10 *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 757. See *Thompson v. Baltimore etc. R. R. Co.* 28 Md. 396, 406, 407. Same effect: *White v. Welsh*, 38 Pa. St. 396, 420; *Parks v. Hall*, 2 Pick. 206, 211; *Hunter v. Talbot*, 3 Smedes & M. 754, 761; *Southwest Freight Co. v. Stanard*, 44 Mo. 71, 84; *Parker v. Byrnes*, 1 Low. 539, 540; *Re Batchelder*, 2 Low. 245, 248. Resale on notice after expiration of credit and default in payment: *Babcock v. Bonnell*, 80 N. Y. 244, 249. English views: See *New v. Swaim*, Dan. & Ll. 193, 195; *Dixon v. Yates*, 5 Barn. & Adol. 313, 339.
- 11 See *Clark v. Draper*, 19 N. H. 419, 423.
- 12 *Milliken v. Warren*, 57 Me. 46, 50. And see *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754, 759; *Parker v. Byrnes*, 1 Low. 539, 540. Payment in note of third person: See *Benedict v. Field*, 16 N. Y. 595. Transfer of note: See *Creanor v. Creanor*, 36 Ark. 91; *Jeckell v. Fried*, 18 La. An. 192; *Johnson v. Dickinson*, 78 N. Y. 42. Extinction of lien by giving receipted bill of parcels, etc.: *Chapman v. Searle*, 3 Pick. 38, 45.
- 13 *Gunn v. Bolekow*, Law R. 10 Ch. App. 491, 501. Application where goods lie in warehouse of third party: *Dixon v. Yates*, 5 Barn. & Adol. 313, 341. But compare *Pooley v. Great Eastern Ry. Co.* 34 L. T. N. S. 537, 540. Waiver of lien generally, by taking bills as payment: *Horncastle v. Farran*, 3 Barn. & Ald. 497; *Hewison v. Guthrie*, 2 Bing. N. C. 755.

§ 410. *Sub-sale and estoppel.*—*Resale by buyer.* A resale of the goods by the buyer, even to a *bona fide* purchaser, in no way affects the vendor's lien, unless the sale was made with the vendor's knowledge and approval.<sup>1</sup> But if goods sold for a promissory note at sixty days be left with the vendor, and he show them as the goods of the vendee, a sale by the vendee to the person who thus examined them will be good as against a transfer by the vendor.<sup>2</sup> In England, prior to the

latest of the factor's acts,<sup>3</sup> not only a sub-sale by the vendee,<sup>4</sup> but even the mere giving of a delivery order and its transfer to the sub-vendee, did not deprive the owner of his right of lien for the price of the goods.<sup>5</sup>

*Estoppel of seller.* But a seller who expressly or impliedly recognizes a delivery order is estopped from asserting his lien for the unpaid price, as against a sub-vendee of the buyer,<sup>6</sup> who has by such conduct been induced to alter his position either by actual payment of the price, or by abstaining from action to recover it back.<sup>7</sup> And in this country it has been held that where the position of a pledgee is altered by relying on an evidence of title, such as a warehouse receipt in the hands of the buyer, and a consequent abstaining from action by way of an attempt to recover the loan or secure an indemnity, the unpaid seller of the goods is estopped from claiming title thereto.<sup>8</sup>

1 Hamberger v. Rodman, 9 Daly, 93. And see Haskell v. Rice, 11 Gray, 240; Milliken v. Warren, 57 Me. 46.

2 Hunn v. Bowne, 2 Caines, 38. No replevin by sub-vendee of unspecified and unappropriated chattels: Scudder v. Worster, 11 Cush. 573.

3 See 40, 41 Vict. (1877) ch. 39, § 5.

4 See Dixon v. Yates, 5 Barn. & Adol. 313, 339, 343.

5 McEwan v. Smith, 2 H. L. Cas. 309, 325; Griffiths v. Perry, 1 El. & E. 680, 689. And see Imperial Bank v. London etc. Dock Co. Law R. 5 Ch. D. 195, 200; 22 Eng. Rep. 24, 29. Otherwise if document transferred is shown to be regarded as negotiable: Merchant Banking Co. v. Phoenix Bessemer Steel Co. Law R. 5 Ch. D. 205, 215; 22 Eng. Rep. 33, 42. But compare Gunn v. Bolckow, Law R. 10 Ch. App. 491, 503.

6 Pearson v. Dawson, El. B. & E. 448, 456, 457, 458. But compare Farmeloe v. Bain, Law R. 1 C. P. D. 445, 450, 451; 17 Eng. Rep. 349, 354, 355; Merchant Banking Co. v. Phoenix Bessemer Steel Co. Law R. 5 Ch. D. 205, 215; 22 Eng. Rep. 33, 43.

7 Knights v. Wiffen, Law R. 5 Q. B. 660, 665, 667; Langdell's Cases on Sales, 766, 771, 772; following Woodley v. Coventry, 2 Hurl. & C. 164; Langdell's Cases on Sales, 760.

8 Voorhis v. Olmsted, 66 N. Y. 113. But compare Hamburger v. Rodman, 9 Daly, 93, 100.

## CHAPTER XXXVIII.

## STOPPAGE IN TRANSITU.

- § 411. In general.
- § 412. Buyer's insolvency.
- § 413. Duration of transit.
- § 414. Capacity of middleman.
- § 415. Delivery terminating transit.
- § 416. By whom right exercised.
- § 417. Mode of exercising right.
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§ 411. In general. — *Nature and requisites.* Stoppage *in transitu* is a resumption by the seller of the possession of goods not paid for, while on their way to the buyer and before he has acquired actual possession.<sup>1</sup> And to enable the vendor to exercise the right, the goods sold must be unpaid for, the vendee must be insolvent, and the goods must be in transit.<sup>2</sup> This right does not proceed on the ground of rescinding but of continuing the contract of sale, by way of extension of an equitable lien on the goods.<sup>3</sup>

*Non-payment of any part of price.* If there be any part of the purchase money unpaid, and the purchaser becomes insolvent, the vendor has the right of stopping the chattels *in transitu*, at any time before actual delivery.<sup>4</sup>

*Giving credit, taking notes, etc.* Nor will the seller be deprived of his right of stoppage *in transitu* because the goods were sold on credit,<sup>5</sup> nor by reason of the taking or even the negotiating of promissory notes, bills of exchange, or other like instruments, if not received by way of absolute payment of the price.<sup>6</sup>

<sup>1</sup> 2 Bouvler Law Dict. tit. Stoppage in Transitu. And see Loeb v. Peters, 63 Ala. 243; 35 Am. Rep. 17, 18; 2 Kent Com. 540; Atkins v. Colby, 20 N. H. 154, 155; O'Brien v. Norris, 16 Md. 122, 130; Inslee v. Lane, 57 N. H. 454, 457; Hause v. Judson, 4 Dana, 7; 29 Am. Dec. 377,

380. Distinguished from rescission by mutual consent: *Ash v. Putnam*, 1 Hill, 302. Exact character stated: *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809. Basis in reason of justice, etc.: See *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17, 19; 2 Kent Com. 542; *Symms v. Schotten*, 10 Pacif. Rep. (Kan.) 823. May be exercised upon negotiable paper: *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259, 268, 270.

2 *More v. Lott*, 13 Nev. 376, 379. And see *Wood v. Roach*, 2 Dall. 180; 1 Am. Dec. 276; *Cooper v. Bill*, 3 Hurl. & C. 722, 727; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 190; *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809. But if the goods pass from the hands of the carrier or other middleman into the actual possession or control of the buyer, the seller's right over them is gone: See *Cooper v. Bill*, 3 Hurl. & C. 722, 727; *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809. And consult *The St. Joze Indiana*, 1 Wheat. 208, 212; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 190.

3 See *Jordan v. James*, 5 Ohio, 88, 98; *Patten's Appeal*, 45 Pa. St. 151, 158, 159; *Kemp v. Falk*, Law R. 7 App. C. 573, 581; 35 Eng. Rep. 395, 403. And consult *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; 2 Kent Com. 541; *Babcock v. Bonnell*, 83 N. Y. 244; *Newhall v. Vargas*, 15 Me. 314, 319; 33 Am. Dec. 617. Insolvency of buyer does not revoke contract: *McElroy v. Seerey*, 61 Md. 389; 48 Am. Rep. 110.

4 *Jordan v. James*, 5 Ohio, 88, 99. Like effect: *Newhall v. Vargas*, 13 Me. 93, 108; 29 Am. Dec. 489; 2 Kent Com. 541. And see *Hodgson v. Loy*, 7 Term Rep. 440; *Feise v. Wray*, 3 East, 93, 102; *Edwards v. Brewer*, 2 Mees. & W. 375; *Van Casteel v. Booker*, 2 Ex. 691, 702; *Atkins v. Colby*, 20 N. H. 154; *Haven v. Place*, 28 Minn. 551, 553. Compare *Newhall v. Vargas*, 15 Me. 314, 324; 33 Am. Dec. 617. Actual delivery: Compare § 415.

5 *Clapp v. Peck*, 55 Iowa, 270. And see *Clapp v. Sohmer*, 55 Iowa, 273; *Babcock v. Bonnell*, 80 N. Y. 244, 249; *Stubbs v. Lund*, 7 Mass. 453, 456; 5 Am. Dec. 63. Unsettled accounts between consignor and consignee: *Wood v. Jones*, 7 Dowl. & R. 126. And see *Kinloch v. Craig*, 3 Term Rep. 119; *Stanton v. Eager*, 16 Pick. 467. But compare *Vertue v. Jewell*, 4 Camp. 31. And see *Patten v. Thompson*, 5 Maule & S. 350, 360, 361.

6 See *Stubbs v. Lund*, 7 Mass. 453; 5 Am. Dec. 63; *Newhall v. Vargas*, 13 Me. 93, 103; 29 Am. Dec. 489; *Clapp v. Sohmer*, 55 Iowa, 273; *Bell v. Moss*, 5 Whart. 189, 200; *Hays v. Mouille*, 14 Pa. St. 48, 54; *Lewis v. Mason*, 36 Up. Can. Q. B. 590, 605-608. But compare *Eaton v. Cook*, 32 Vt. 58.

§ 412. *Buyer's insolvency.—As determining right of stoppage.* The validity of the right of stoppage *in transitu* depends entirely on the bankruptcy or insolvency of the vendee.<sup>1</sup>

*What constitutes.* It is not necessary, however, that there should be proof of a technical insolvency on the part of the buyer, but it is sufficient to show a general inability on his part to pay his debts, although he may not have taken the benefit of an insolvent law, or made an assignment for the benefit of his creditors, or made

a stoppage of payment, or evinced the failure in his circumstances by any overt act.<sup>2</sup>

*Time of insolvency.* And the seller of goods may stop them *in transitu* on account of the buyer's insolvency existing before the sale, but not known to the seller until after the sale.<sup>3</sup>

*Information of insolvency.* It is laid down that any well-founded or probable information of such an embarrassment on the part of the buyer as to prevent him from honoring his drafts, or meeting the demands of his creditors, is sufficient insolvency to justify the vendor in stopping the goods sold.<sup>4</sup> But if through excess of caution or from misinformation, he make a mistake and stop the goods when the buyer is not insolvent, the buyer would be entitled to claim the goods and an indemnification for all the expenses arising out of the stoppage.<sup>5</sup>

1 O'Brien v. Norris, 16 Md. 122, 132. And see Fox v. Willis, 60 Tex. 373, 376, 377; 2 Kent Com. 543; Stewart v. Mau, 2 Tex. App. (Civ. Cas.) § 787; The St. Joze Indiana, 1 Wheat. 203. Insolvency of intermediate party insufficient: Eaton v. Cook, 32 Vt. 53. See Memphis etc. R. R. Co. v. Freed, 38 Ark. 614.

2 See O'Brien v. Norris, 16 Md. 122, 132; Hays v. Mouille, 14 Pa. St. 48, 51; Durgey Cement etc. Co. v. O'Brien, 123 Mass. 12, 13; Naylor v. Dennie, 8 Pick. 198, 205; 19 Am. Dec. 319; Bloomingdale v. Memphis etc. R. R. Co. 6 Lea, 616, 628; Benedict v. Schaettle, 12 Ohio St. 515, 519; More v. Lott, 13 Neb. 376. *Contra*, see discredited case of Rogers v. Thomas, 20 Conn. 53, 62.

3 Loeb v. Peters, 63 Ala. 243, 248; 35 Am. Rep. 17. And see Benedict v. Schaettle, 12 Ohio St. 515, 519; Reynolds v. Boston etc. R. R. Co. 43 N. H. 530, 538. Same effect: Naylor v. Dennie, 8 Pick. 198, 203; 49 Am. Dec. 319; Buckley v. Furniss, 15 Wend. 137; Stevens v. Wheeler, 27 Barb. 658; O'Brien v. Norris, 16 Md. 122, 132; Blum v. Marks, 21 Ia. An. 268, 269; White v. Mitchell, 33 Mich. 330. And see Conyers v. Ennis, 2 Mason, 236; Biggs v. Barry, 2 Curt. 259. *Contra*, see discredited case of Rogers v. Thomas, 20 Conn. 53.

4 More v. Lott, 13 Nev. 376. And consult Walsh v. Blakely, 9 Pacif. Rep. (Mont.) 809. Knowledge of insolvency in general: See O'Brien v. Norris, 16 Md. 122, 132; Blum v. Marks, 21 Ia. An. 268; Lee v. Kilburn, 3 Gray, 595, 599; Secomb v. Nutt, 14 Mon. B. 261, 263.

5 More v. Lott, 13 Nev. 376, 383. Same effect: The Constantia, 6 Rob. Adm. 321; quoted, Benedict v. Schaettle, 12 Ohio St. 515, 518. Compare The Tigress, 22 Law J. Adm. 97, 101.

§ 413. *Duration of transit.—In general.* A vendor has a right to stop goods sold by him, where he dis-

covers the vendee to be insolvent, at any time while the goods are *in transitu*.<sup>1</sup> And goods are said to be in transit so long as they are on the passage, and until they come into the actual or constructive possession of the buyer, or of some person acting for him.<sup>2</sup>

*Beginning and end of transit.* The stoppage to be effective must occur between the two points where the transit begins, which happens when the carrier or middleman takes possession of the goods from the seller as carrier or middleman, and where the transit ends, which happens when the carrier or middleman divests himself of possession in such capacity to the buyer.<sup>3</sup>

*Continuance of transit.* The goods are deemed to be *in transitu*, not only while they remain in the possession of the carrier, whether by land or water, although such carrier may have been named and appointed by the consignee,<sup>4</sup> but also while they are in any place of deposit connected with their transmission and delivery, and until they reach the actual or constructive possession of the consignee, at the place named by the seller to the buyer as their destination.<sup>5</sup>

*Cessation of right of stoppage.* Yet the vendor's right of stoppage is at an end when the goods have either come into the actual possession of the vendee at an intermediate point, or have reached the place of their destination, and are delivered either to the vendee, or in his absence, to a third person selected by the carrier to keep them for the vendee.<sup>6</sup>

*Recommencement of transit.* If a transit is once at end, the delivery is complete and the transit cannot commence again, because the goods are sent to a new and ulterior destination.<sup>7</sup>

1 *Stevens v. Wheeler*, 27 Barb. 658, 663. And see *White v. Welsh*, 38 Pa. St. 396, 420; *Hays v. Mouille*, 14 Pa. St. 48, 51. Compare *Loeb v. Blum*, 25 La. An. 232, 233.



2 *More v. Lott*, 13 Nev. 376. And see *Halff v. Allyn*, 60 Tex. 278, 279.

3 See *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809, 812. And consult *Wenger v. Bernhardt*, 55 Pa. St. 300; *Boyd v. Mosely*, 2 Swan, 661, 663; *Wind Engine etc. Co. v. Oliver*, 16 Neb. 612, 614; *Chicago etc. R. R. Co. v. Painter*, 15 Neb. 394, 396; *Symms v. Schotten*, 10 Pacif. Rep. (Kan.) 728; *Ex parte Watson*, Law R. 5 Ch. D. 35; 21 Eng. Rep. 764; *Hays v. Mouille*, 14 Pa. St. 48, 53; *Covell v. Hitchcock*, 23 Wend. 611; *Buckley v. Furniss*, 15 Wend. 137.

4 See *Berndston v. Strang*, Law R. 4 Eq. 481; *Ex parte Rosevear etc. Co.* Law R. 11 Ch. D. 560; 27 Eng. Rep. 778; *Stokes v. La Riviere*, reported in *Bohtlingh v. Inglis*, 3 East, 337; *Holst v. Pownall*, 1 Esp. 40; *Northey v. Field*, 2 Esp. 613; *Hodgson v. Loy*, 7 Term Rep. 440.

5 *Halff v. Allyn*, 60 Tex. 278, 279. And see *Abbott on Shipping*, 520, 521; *Chandler v. Fulton*, 10 Tex. 13; 60 Am. Dec. 188, 191; *Hall v. Dimond*, 3 Atl. Rep. (N. H.) 423. Compare *Atkins v. Colby*, 20 N. H. 154; *Mohr v. Boston etc. R. R. Co.* 106 Mass. 67, 70; *Sawyer v. Joslin*, 20 Vt. 172, 179; 49 Am. Dec. 768; *Conyers v. Ennis*, 2 Mason, 236.

6 See *Lane v. Robinson*, 18 Mon. B. 623, 630; *Stevens v. Wheeler*, 27 Barb. 653, 663, 664; *Wood v. Yeatman*, 15 Mon. B. 270, 279, 280; *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809.

7 *Pottinger v. Hecksher*, 2 Grant Cas. 309, 314. And see *Brooke Iron Co. v. O'Brien*, 135 Mass. 442, 447.

§ 414. *Capacity of middleman.*—*In general.* In the absence of any understanding to the contrary, the employment of a carrier by a seller of goods on credit, constitutes all middlemen into whose custody they pass, agents of the seller, for their transportation and delivery, and the goods are deemed in transit until the complete performance of the carrier's whole duty.<sup>1</sup>

*Intermediate agent.* If, however, a party to whom goods are delivered is clothed with a general and unlimited power to receive them and alter their destination, the transit ends, as between vendor and vendee, when the goods reach his hands.<sup>2</sup> But if an agent be clothed only with specific and limited authority, to forward goods to a particular destination, the transitus is not at end until the goods have reached the place named by the buyer or seller as such destination.<sup>3</sup> Accordingly the vendor's right of stoppage continues, where an intermediate delivery occurs before the goods reach their ultimate destination, if the middleman to whom they are thus delivered, or with whom they are thus

deposited, has no authority to give them a new destination not originally intended, but is a mere agent to transmit or forward the goods in accordance with the original directions.<sup>4</sup> On the other hand the *transitus* is at an end, and the vendor's right of stoppage ceases when goods are delivered at a place where they will remain until a fresh impulse is communicated to them by the vendee,<sup>5</sup> as if they reach the hands of a forwarding merchant, there to await the instructions of the purchaser respecting any further transit.<sup>6</sup>

*Detention for carrier's charges.* The right of stoppage remains, however, while the goods are still liable to be held by the carrier, subject to his lien for freight or charges, or are so detained,<sup>7</sup> and in the absence of clear proof of an arrangement or agreement that the carrier holds the goods in the capacity of warehouseman for the buyer.<sup>8</sup>

1 Calahan v. Babcock, 21 Ohio St. 281, 293; 8 Am. Rep. 63. Carrier's attitude toward goods at terminus: See James v. Griffin, 2 Mees. & W. 623; Bolton v. Lancashire etc. Ry. Co. Law R. 1 Com. P. 431, 438; Ex parte Burrow, Law R. 6 Ch. D. 783; 23 Eng. Rep. 349, 354; Jackson v. Nichol, 5 Bing. N. C. 508, 518; Whitehead v. Anderson, 9 Mees. & W. 518, 535; Coventry v. Gladstone, Law R. 6 Eq. 44, 50; Ex parte Cooper, Law R. 11 Ch. D. 68; 27 Eng. Rep. 338, 342; Inslee v. Lane, 57 N. H. 454; Alsberg v. Latta, 30 Iowa, 442, 447; McFetridge v. Piper, 40 Iowa, 627, 628. Capacity of middleman as question of fact: Hall v. Dimond, 3 Atl. Rep. (N. H.) 423. Question whether warehouseman received goods as agent of vendee or of carrier: Hoover v. Tibbits, 13 Wis. 79, 81. See, also, 2 Kent Com. 545; Chandler v. Fulton, 10 Tex. 14; 60 Am. Dec. 188, 191; Halff v. Allyn, 60 Tex. 278, 282.

2 Pottinger v. Hecksher, 2 Grant Cas. 309, 314.

3 Pottinger v. Hecksher, 2 Grant Cas. 309, 314. And see O'Neil v. Garrett, 6 Iowa, 480, 485. Goods rejected by both parties: Bolton v. Lancashire etc. Ry. Co. Law R. 1 Com. P. 431.

4 See Cabeen v. Campbell, 30 Pa. St. 254, 259; Markwald v. Creditors, 7 Cal. 213, 214. Same effect: Blackman v. Pierce, 23 Cal. 508, 511; Aguirre v. Parmelee, 22 Conn. 473, 482; Pottinger v. Hecksher, 2 Grant Cas. 309, 314; Hepp v. Glover, 15 La. 461; 35 Am. Dec. 206, 208, 209; Harris v. Pratt, 17 N. Y. 249, 252, reviewing English and other cases; Harris v. Hart, 6 Duer, 606, 613, 616, 617, reviewing cases and stating conclusions.

5 Guilford v. Smith, 30 Vt. 49, 67. And see Gill v. Benjamin, 64 Wis. 362; 54 Am. Rep. 619, 622; citing, Dixon v. Baldwin, 5 East, 175; Kendall v. Stevens (or Marshall), Law R. 11 Q. B. D. 356; and Ex parte Miles, Law R. 15 Q. B. D. 39.

6 *Biggs v. Barry*, 2 Curt. 259, 262; discussed, *Harris v. Hart*, 6 Duer, 606, 625. Same effect: *Hays v. Mouille*, 14 Pa. St. 43; *Guilford v. Smith*, 30 Vt. 49, 61; *Ex parte Gibbes*, Law R. 1 Ch. D. 101, 109; 15 Eng. Rep. 667, 674. See *Becker v. Hallgarten*, 86 N. Y. 167, 173, 174. Right of stoppage gone if delivery to a special agent or bailee representing the buyer, and receiving the goods either for custody or disposal: *Walsh v. Blakely*, 9 Pac. Rep. (Mont.) 809.

7 See *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 763, 773; *Calahan v. Babcock*, 21 Ohio St. 281; 8 Am. Rep. 63, 65.

8 See *Kemp v. Falk*, Law R. 7 App. C. 573, 584; 35 Eng. Rep. 395, 405; and consult *Hall v. Dimond*, 3 Atl. Rep. (N. H.) 433; *Ex parte Cooper*, Law R. 11 Ch. D. 68, 74, 76, 78; 27 Eng. 338, 343, 345, 346; *Ex parte Burrow*, Law R. 6 Ch. D. 783, 788; *Whitehead v. Anderson*, 9 Mees. & W. 518, 535; *Symms v. Schotten*, 10 Pacif. Rep. (Kan.) 828, discussing subject. But compare *Guilford v. Smith*, 30 Vt. 49, 72; *Allen v. Griffin*, 2 Crompt. & J. 218. Consult further, *Macon Western R. R. Co. v. Meador*, 65 Ga. 725; *Inslee v. Lane*, 59 N. H. 454; *Greve v. Dunham*, 60 Iowa, 108, 111; *McLean v. Brethaupt*, 19 Cent. L. J. (Can.) 176; *More v. Lott*, 13 Nev. 376, 383.

§ 415. **Delivery terminating transit.**—*Actual delivery.* The actual delivery to the vendee which puts an end to the *transitus*, or state of passage,<sup>1</sup> may be at the vendee's own warehouse, or at a place used by him for the deposit of goods;<sup>2</sup> or where such is the intent of the parties, by loading the goods on trucks sent by the buyer's agents;<sup>3</sup> or as generally held, by placing the goods on board the vendee's own vessel, or even one chartered by him.<sup>4</sup> So the delivery of goods to the vendee, which puts an end to the state of passage, and so deprives the vendor of the right of stoppage *in transitu*, may be at a place where the vendee means the goods to remain until a fresh destination is given to them by orders from himself.<sup>5</sup>

*Constructive delivery.* And a vendor of goods cannot exercise the right of stoppage *in transitu* where there has been a constructive delivery to the buyer, as after the goods have been delivered by the carrier to a third person on the vendee's order;<sup>6</sup> or where the goods, having reached their destination, have been deposited in a warehouse, subject to the order and control of the buyer;<sup>7</sup> or where the goods have been landed at the customary place upon a wharf near the buyer's place

of business, and where they are free from any outside custody or lien for freight or charges.<sup>8</sup>

*Insufficient delivery.* But the transfer of goods from the car into the depot or warehouse at the station designated for their discharge, in the vicinity of the buyer's place of business, there to await the payment by him of the charges thereon, does not *ipso facto* constitute a delivery thereof.<sup>9</sup> Nor does the taking of personal property from the carrier by an officer levying execution thereon, under the process, and not as agent of the purchasers, operate as a delivery to them, so as to defeat the right of stoppage.<sup>10</sup> And it seems that the delivery of part of the goods is not a delivery of the whole, so as to divest the right of stoppage, unless the parties so intended.<sup>11</sup>

*Entry at custom-house.* So it appears to be the law that the entry of the goods by the vendee at the custom-house at the port of delivery, without the payment of the duties, is not a termination of the *transitus*, so as to make the right of stoppage cease;<sup>12</sup> nor does such right terminate unless there has been a recognition of the buyer's title,<sup>13</sup> or a perfected entry in a bonded warehouse.<sup>14</sup>

*Intercepting goods.* But if the vendee intercepts the goods on their passage to him, and takes possession as owner, the delivery is complete, and the right of stoppage gone.<sup>15</sup>

1 James v. Griffin, 1 Mees. & W. 20; 2 Mees. & W. 663. Manual possession held requisite: Whitehead v. Anderson, 9 Mees. & W. 518, 534; Crawshay v. Eades, 1 Barn. & C. 181, 184. But see Sawyer v. Joslin, 20 Vt. 172; 49 Am. Dec. 768, 770, 773; Inslee v. Lane, 57 N. H. 454, 458.

2 Scott v. Pettit, 3 Bos. & P. 469, 472; Rowe v. Pickford, 8 Taunt 83, 85.

3 Merch. Bank. Co. v. Phoenix etc. Co. Law R. 5 Ch. D. 219; 22 Eng. Rep. 33, 46.

4 See Bolin v. Huffnagle, 1 Rawle, 9, 18; Thompson v. Stewart, 7 Phila. 187; Pequeno v. Taylor, 38 Barb. 375. And consult Van Casteel v. Booker, 2 Ex. 691, 708; Schotsman v. Lancashire etc. Ry. Co. Law R. 2 Ch. 332, 336. Compare Turner v. Liverpool Docks Trustees, 6 Ex. 547; Berndston v. Strang, Law R. 4 Eq. 481. But see Stubbs v. Lund,

7 Mass. 453, 457, 458; 5 Am. Dec. 63; *Ilsley v. Stubbs*, 9 Mass. 65, 72; 6 Am. Dec. 29. Consult further, *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721, 724; *Newhall v. Vargas*, 13 Me. 93, 107; 29 Am. Dec. 489, 494; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Parker v. M'Iver*, 1 Desaus. Eq. 274, 281.

5 *Becker v. Hallgarten*, 86 N. Y. 167, 173, 174.

6 *Stevens v. Wheeler*, 27 Barb. 653, 661. Sufficiency of constructive delivery in general: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 183, 191.

7 *Frazer v. Hilliard*, 2 Strob. 309, 317.

8 *Sawyer v. Joslin*, 20 Vt. 172, 180; 49 Am. Dec. 768. And compare *Cooper v. Bill*, 3 Hurl. & C. 722, 729.

9 *Calahan v. Babcock*, 21 Ohio St. 281, 293; 8 Am. Rep. 63. Delivery at nearest railway depot to place of destination: *Half v. Ailyn*, 60 Tex. 278.

10 *Sherman v. Rugee*, 55 Wis. 346, 349.

11 See *Kemp v. Falk*, Law R. 7 App. C. 573; 35 Eng. Rep. 395, 407; *Ex parte Cooper*, Law R. 11 Ch. D. 63; 27 Eng. Rep. 338, 341, 345. And consult *Buckley v. Furniss*, 17 Wend. 504, 505.

12 *Mottram v. Heyer*, 5 Denio, 629, 632. And see *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, *Abbott on Shipping*, 377.

13 See exhaustive review of cases in *Wiley v. Smith*, 1 Ont. App. 179; affirmed, 2 Duval, 1; followed, *Wilds v. Smith*, 2 Ont. App. 8, 12. And consult *Orr v. Murdock*, 2 Ir. Com. Law Rep. 9.

14 *Fraschieris v. Henriques*, 6 Abb. Pr. N. S. 251, 255-261, reviewing the cases and stating conclusions. See, also, *Cartwright v. Wilmerding*, 24 N. Y. 521, 537. Compare *Mohr v. Boston etc. R. R. Co.* 106 Mass. 67, 71; *Donath v. Broomhead*, 7 Pa. St. 301.

15 *Secomb v. Nutt*, 14 Mon. B. 261, 264. And see 2 Kent Com. 547; *Mohr v. Boston etc. R. R. Co.* 106 Mass. 67; *Walsh v. Blakely*, 9 Pacif. Rep. (Mont.) 809. Compare *Muskegon Booming Co. v. Underhill*, 43 Mich. 629. Consent or refusal of carrier immaterial: *Whitehead v. Anderson*, 9 Mees. & W. 518, 534. And see *Bird v. Brown*, 4 Ex. 786; *London etc. Ry. Co. v. Bartlett*, 7 Hurl. & N. 400. Changing destination, etc.: *Hays v. Mouille*, 14 Pa. St. 48, 50. Compare *Pool v. Houston etc. Ry. Co.* 53 Tex. 134. Release of attachment, etc.: *Wood v. Yeatman*, 15 Mon. B. 270, 280.

§ 416. By whom right exercised. — *Quasi vendors, etc.* The right of stoppage *in transitu* has been extended to *quasi* vendors or persons standing in a similar position to vendors;<sup>1</sup> and the right may be exercised by a party upon whose credit or with whose means the goods are purchased, and by whom they are consigned to the purchasers;<sup>2</sup> or by the seller of an interest in an executory agreement for the sale of unseparated goods;<sup>3</sup> or by a person who pays the price of the goods for the buyer, and takes from him an assignment of the bill of lading as security for such advances.<sup>4</sup>

*Agent without special authority.* And any agent, authorized to act for the consignor, either generally, or in relation to the consignment in question, may stop goods *in transitu*, without any authority to adopt that particular measure.<sup>5</sup>

*Buyer's countermand, etc.* The right of stoppage *in transitu*, though adverse to the consignee, has been held not defeated by a writing from him to the consignor, revoking the order for the goods, and declining to receive them.<sup>6</sup>

1 Gossler v. Schepeler, 5 Daly, 476, 479.

2 See Muller v. Pondir, 55 N. Y. 325; 14 Am. Rep. 259, 270. Also, Newhall v. Vargas, 13 Me. 93, 103; 29 Am. Dec. 489; Seymour v. Newton, 105 Mass. 272, 275; Ilsley v. Stubbs, 9 Mass. 65, 71, 72; 6 Am. Dec. 29. Compare Jordan v. James, 5 Ohio, 88, 104.

3 Jenkyns v. Usborne, 7 Man. & G. 678, 698. But not by one having a lien for labor on the goods: Sweet v. Pym, 1 East, 4, 5. Nor third party filling order for goods: Memphis etc. Ry. Co. v. Freed, 38 Ark. 614.

4 Gossler v. Schepeler, 5 Daly, 476. Buyer's surety in England: Siffken v. Wray, 6 East, 371, 380; Imperial Bank v. London etc. Dock Co. Law R. 5 Ch. D. 195, 202.

5 Reynolds v. Boston etc. R. R. 43 N. H. 580, 589. But see Summeril v. Elder, 1 Binn. 106. And compare Gwyn v. Richmond etc. R. R. Co. 85 N. C. 429; 39 Am. Rep. 708. Ratification of unauthorized stoppage: Bird v. Brown, 4 Ex. 786, 798; Hutchings v. Nunez, 1 Moore P. C. C. (N. S.) 243, 253, 257; Newhall v. Vargas, 13 Me. 93, 109; 29 Am. Dec. 489, 496; Durgy Cement etc. Co. v. O'Brien, 123 Mass. 12, 14. And see Chandler v. Fulton, 10 Tex. 2; 60 Am. Dec. 188, 195.

6 Naylor v. Dennie, 8 Pick. 198, 205; 19 Am. Dec. 319. Stoppage or rescission by insolvent buyer refusing to receive goods, etc.: See Cox v. Burns, 1 Iowa, 64, 68; Grout v. Hill, 4 Gray, 361, 366, 367. Compare Heinekey v. Earle, 8 El. & B. 410, 422; Byrnes v. Fuller, 1 Brev. 316, 317.

§ 417. *Mode of exercising right.*—*Demand, notice, etc.* No particular mode of exercising the right of stoppage *in transitu* is requisite, but any means not criminal are deemed justifiable.<sup>1</sup> Nor is it essential that there should be actual seizure of the goods before they come into the hands of the vendee.<sup>2</sup> But it is sufficient if there be a demand of the goods from the carrier, or notice to him to stop them and not to deliver them to the buyer, or a claim and endeavor to get the possession.<sup>3</sup>

*Enforcing by action.* Equitable relief will be granted to the seller, to enable him to enforce his right of stoppage *in transitu*, if it be necessary for the protection of the lien on the goods.<sup>4</sup>

*Carrier's liability.* If a carrier, after being clearly notified by the seller of goods to stop them *in transitu*, fails to do so, and delivers them to the buyer, he is liable for their value.<sup>5</sup>

1 See 2 Kent Com. 543; *Snee v. Prescott*, 1 Atk. 245, 250.

2 *Rucker v. Donovan*, 13 Kan. 251, 255; 19 Am. Rep. 84.

3 See *Rucker v. Donovan*, 13 Kan. 251, 255; 19 Am. Rep. 84; *Reynolds v. Boston etc. R. R. Co.* 43 N. H. 580, 591. And consult 2 Kent Com. 543; *O'Brien v. Norris*, 16 Md. 122, 130; *Newhall v. Vargas*, 13 Me. 93, 109; 29 Am. Dec. 489; *Seymour v. Newton*, 105 Mass. 272, 275; *Litt v. Cowley*, 7 Taunt. 168, 170; *Kemp v. Falk*, Law R. 7 App. Cas. 573, 585; 35 Eng. Rep. 395, 406. Sufficient specification of goods for identification required: *Clements v. Grand Trunk Ry. Co.* 42 Up. Can. Q. B. 263, 270, 271. Party upon whom notice should be served: *Poole v. Houst. etc. Ry. Co.* 53 Tex. 134, 140. Insufficiency of telegram to consignee to hold proceeds of pledged property, and not the goods themselves: *Phelps v. Comber*, Law R. 29 Ch. D. 813, 821. Insufficiency of demand on vendee, while goods in custody of custom-house officers: *Mottram v. Heyer*, 5 Denio, 629, 634. Stopping remainder of goods of which part sold on way: *Secomb v. Nutt*, 14 Mon. B. 261, 266. And see *Buckley v. Furniss*, 17 Wend. 504.

4 *Strahlheim v. Wallach*, 29 Alb. L. J. 233, 234. And see *Hause v. Judson*, 4 Dana, 7; 29 Am. Dec. 377, 383; *Schotsman v. Lancashire etc. Ry. Co.* Law R. 2 Ch. App. 332, 339. Bills brought: *Gossler v. Schepeler*, 5 Daly, 476; *Rosenthal v. Dessau*, 11 Hun, 49. Right not enforceable by replevin suit for intoxicating liquors illegally sold: *Howe v. Stewart*, 40 Vt. 145, 150. Consignor stopping goods let in to defend suit against commission merchant: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 190.

5 *Bloomington v. Memphis etc. R. R. Co.* 6 Lea, 616, 620. See, also, *The Tigress*, 32 Law J. Adm. 97; *Litt v. Cowley*, 7 Taunt. 168. And consult *Pool v. Houst. etc. Ry. Co.* 58 Tex. 134. But compare *MacVeagh v. Atchinson etc. R. R. Co.* 5 Pacif. Rep. (N. M.) 457.

§ 418. *Mode of defeating right.*—*Transfer of bill of lading.* The right of stoppage *in transitu* is lost if the purchaser has sold or transferred the goods, and indorsed and delivered the bill of lading to a sub-purchaser or further transferee in good faith and for value.<sup>1</sup>

*Good faith and consideration.* And the rule is that in order that the indorsee should be protected, he must be without notice of such circumstances as render the bill

of lading not fairly and honestly assignable.<sup>2</sup> Yet it is deemed sufficient if the purchase is made in good faith and in the usual course of business, though the consideration of the sale was the payment of an antecedent debt.<sup>3</sup>

*Mere resale.* But a mere resale, without any transfer of the bill of lading, is considered not to defeat the seller's right of stoppage *in transitu*.<sup>4</sup>

*Assignment to pay debts.* So the right of stoppage *in transitu* is not affected by an assignment of the goods for the payment of the vendee's debts, but the assignee stands, in this respect, in the same position that his assignor occupied.<sup>5</sup>

*Creditor's levy.* And if goods are levied on or seized by a creditor of the purchaser under an attachment or execution before they reach their destination, this will not affect the seller's right of stoppage.<sup>6</sup>

*Carrier's lien for freight charges.* But the lien of a carrier for his freight charges, upon the particular goods in question, as distinguished from a claim for a general balance of account for freight, is paramount to the seller's right of stoppage *in transitu*.<sup>7</sup>

1 See *Loeb v. Peters*, 63 Ala. 243, 248; 35 Am. Rep. 17; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 196. And consult *Walter v. Ross*, 2 Wash. C. C. 283, 285, 286; *Lee v. Kimball*, 45 Me. 172, 174; *Dows v. Perrin*, 16 N. Y. 325, 352; also, *Dows v. Greene*, 32 Barb. 490, 507, 508; *Curry v. Roulston*, 2 Over. 110, 113; *Audenried v. Randall*, 3 Cliff. 99, 106, 107. Compare *Conard v. Atlantic Ins. Co.* 1 Peters, 386, 445. Insufficiency of merely making out the bill of lading in the name of the purchaser: *Ex parte Golding Davis*, Law R. 1 Ch. D. 628, 634, 638; 36 Eng. Rep. 772. Compare *Becker v. Hallgarten*, 86 N. Y. 167. Sub-transfer by way of pledge or mortgage: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 199, 200. And see *Kemp v. Falk*, 7 App. Cas. 573; 35 Eng. Rep. 395; *Blossom v. Champion*, 28 Barb. 217, 224. Seller replevying goods in transit liable for conversion: *Rawls v. Deshler*, 4 Abb. N. Y. App. 12. Transfer of custom-house order insufficient: *Ives v. Pollak*, 14 How. Pr. 411. Premature transfer of bill of lading, or promise thereof, before document has come into possession of consignee: See *Patteson v. Coulton*, 33 Ind. 240; 5 Am. Rep. 199; *Stanton v. Eager*, 16 Pick. 467, 476; *Walter v. Ross*, 2 Wash. C. C. 283, 290. Fraudulent transfer insufficient: *Rosenthal v. Dessau*, 18 N. Y. Sup. Ct. 49, 50. But compare *Pease v. Gloahec*, Law R. 1 P. C. 219, 226.

2 *Cuming v. Brown*, 9 East, 506, 516; 2 Kent Com. 550; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 196, 197. And see *Newhall v.*



Cent. Pac. R. R. Co. 51 Cal. 345, 350, 341; 21 Am. Rep. 713; *Rodger v. The Comptoir d'Escompte*, Law R. 2 P. C. 393, 404; *Loeb v. Peters*, 63 Ala. 243, 248; 35 Am. Rep. 17; *Stanton v. Eager*, 16 Pick. 467, 476.

3 *Lee v. Kimball*, 45 Me. 172, 174. Like effect: *Leask v. Scott*, Law R. 2 Q. B. 376, 379, 380; disapproving, *Rodger v. Comptoir d'Escompte*, Law R. 2 P. C. 393. Held otherwise where transfer of bill of lading as mere security for pre-existing debt, and nothing advanced, given up, or lost on the part of the transferee: See *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17; *Lessassier v. The Southwestern*, 2 Woods, 35. But compare *contra*, *Clementson v. Grand Trunk Ry. Co.* 42 Up. Can. Q. B. 263, 273.

4 See *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 195; 2 Kent Com. 547; *Pattison v. Culton*, 33 Ind. 240, 243; 5 Am. Rep. 199. But see *U. S. Wind Engine Co. v. Oliver*, 16 Neb. 612, 614. And compare *Eaton v. Cook*, 32 Vt. 58, 60; *Hollingsworth v. Napier*, 3 Caines, 182, 186; 2 Am. Dec. 268. Like doctrine as to consignee agreeing to transfer goods not yet received by him: *Clapp v. Sohmer*, 55 Iowa, 273. And see *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259. Consult, also, *Ilisley v. Stubbs*, 9 Mass. 65, 67; 6 Am. Dec. 29. But compare *Walter v. Ross*, 2 Wash. C. C. 283, 286.

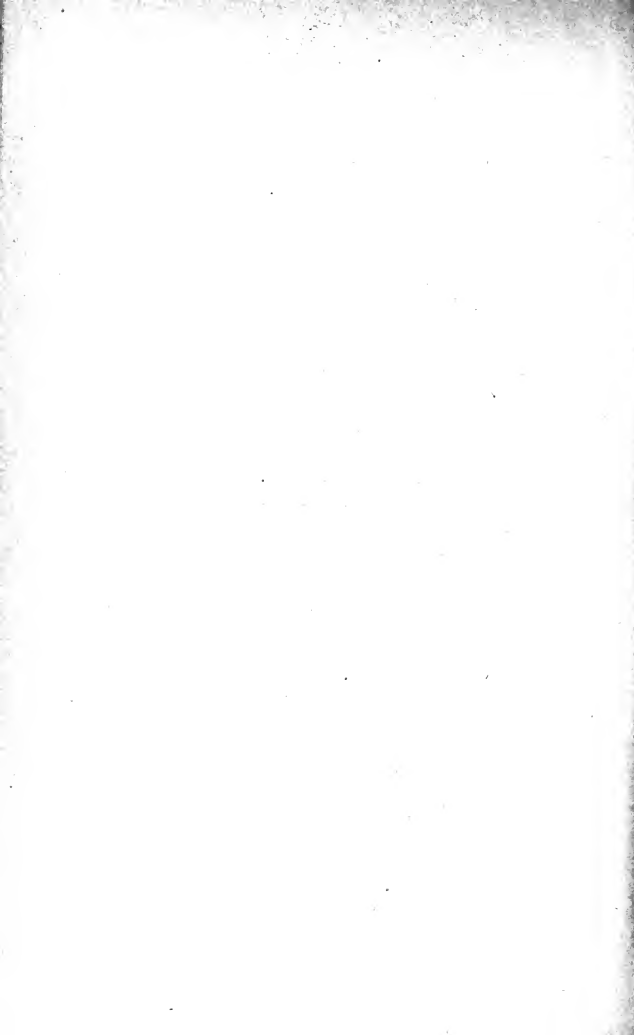
5 *Harris v. Hart*, 6 Duer, 606, 627. Like effect: *Stanton v. Eager*, 16 Pick. 467, 476; *Arnold v. Delano*, 4 Cush. 33, 41; 50 Am. Dec. 754. See *Lessassier v. The Southwestern*, 2 Woods, 35; *Loeb v. Peters*, 63 Ala. 243, 249; 35 Am. Rep. 17, 19; *Harris v. Pratt*, 17 N. Y. 249, 269; *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 188, 195.

6 *Buckley v. Furniss*, 15 Wend. 137, 143. And see *Calahan v. Babcock*, 21 Ohio St. 281, 294; 8 Am. Rep. 63. Like effect: *Sherman v. Rugee*, 55 Wis. 346, 348; *More v. Lott*, 13 Nev. 376, 379, 380; *Blackman v. Pierce*, 23 Cal. 508, 511; *O'Neil v. Garrett*, 6 Iowa, 480, 486; *Morris v. Shryock*, 50 Miss. 590, 597; *Wood v. Yeatman*, 15 Mon. B. 270, 279; *Durgy Cement etc. Co. v. O'Brien*, 123 Mass. 12, 14; *Mississippi Mills v. Bauk*, 9 Lea, 314, 318; 21 Am. Law Reg. 534, n. 537; *Naylor v. Dennie*, 8 Pick. 198, 204; 19 Am. Dec. 319; *Hause v. Judson*, 4 Dana, 13; 29 Am. Dec. 377, 381; *Hepp v. Glover*, 15 La. 461; 35 Am. Dec. 206, 209; *Benedict v. Schaettle*, 12 Ohio St. 515.

7 See *Potts v. New York etc. R. R.* 131 Mass. 455; *Oppenheim v. Russell*, 3 Bos. & P. 42; 2 Kent Com. 541. And consult *Rucker v. Donovan*, 13 Kan. 251, 256; 19 Am. Rep. 84, 86.



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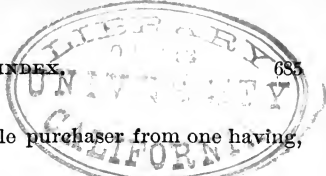
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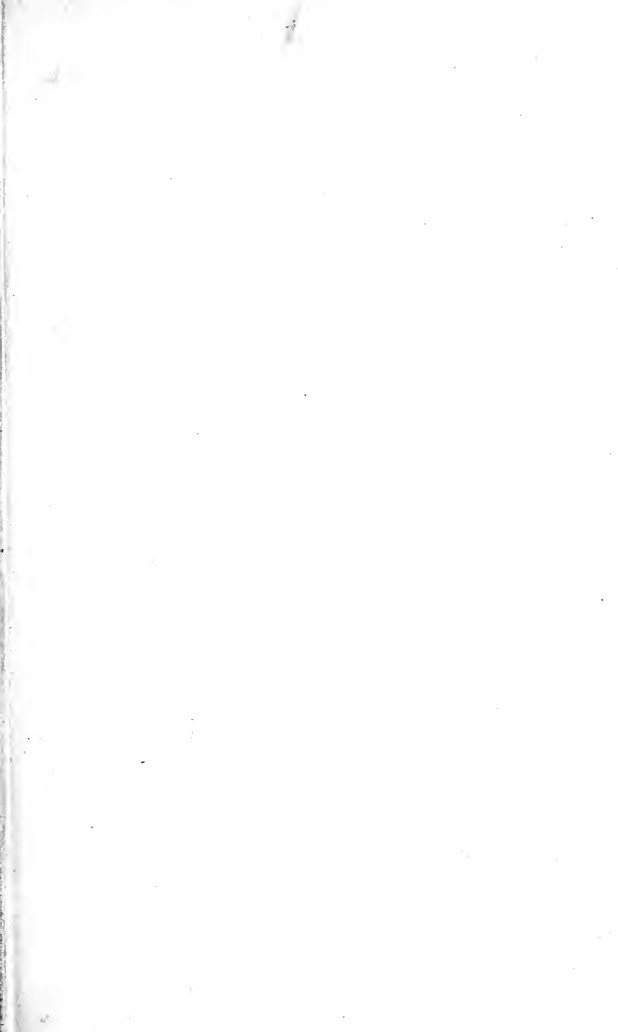
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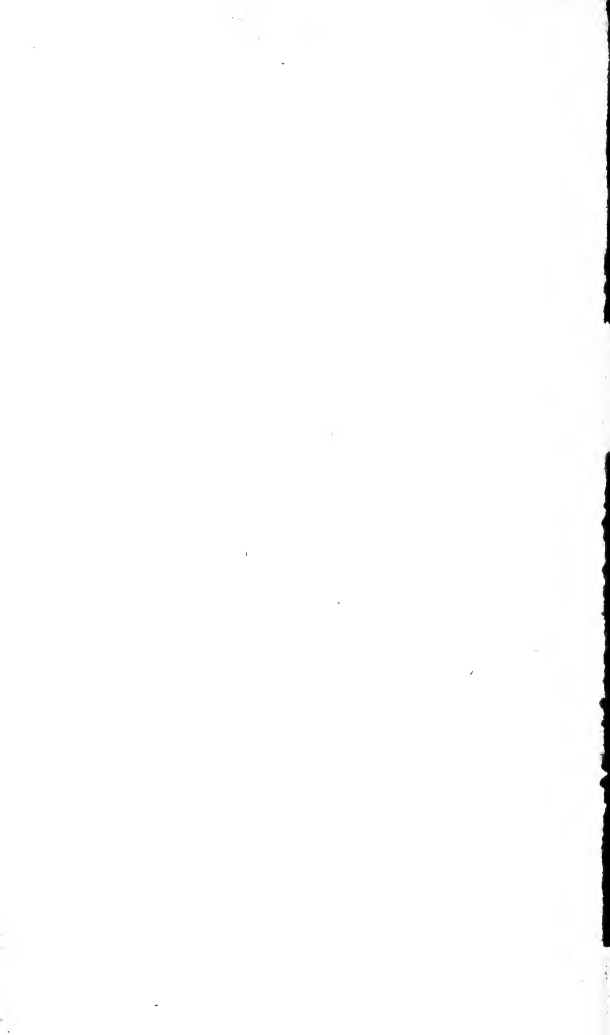
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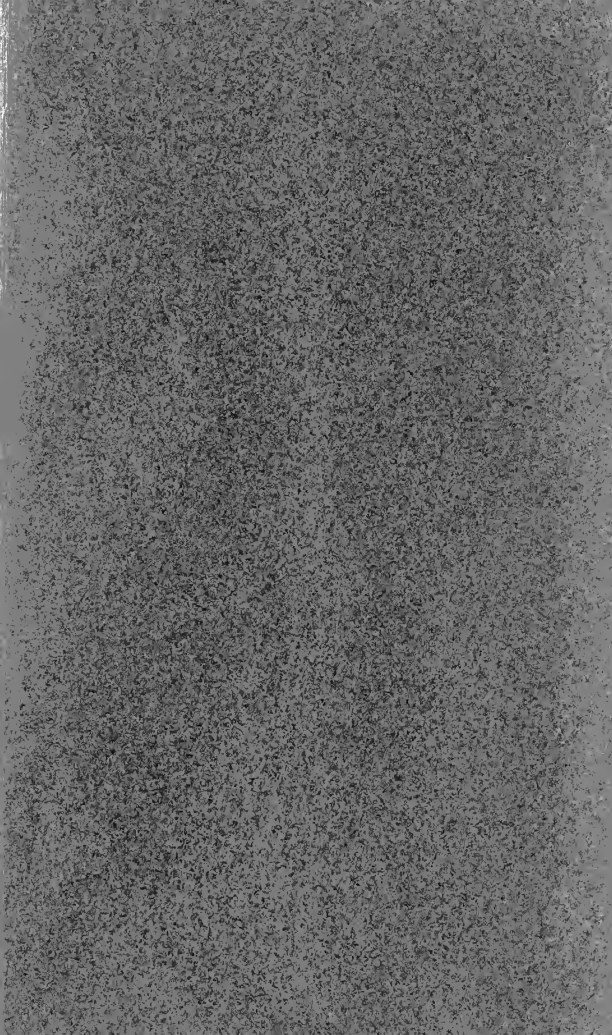
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